Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1427

REV. PAUL A. McDANIEL - - - - - - - - - - - - - - - - - Appellant,

v.

SELMA CASH PATY, a resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission, - Appellees.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

FREDERIC S. LE CLERCQ
1505 West Cumberland
Knoxville, Tennessee 37916

J. THOMAS MANN
THOMAS, LEITNER, MANN,
WARNER & OWENS
330 Pioneer Building
Chattanooga, Tennessee 37402

Attorneys for Appellant

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

REVEREND PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, ET AL.,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Tennessee entered March 7, 1977, in which the Supreme Court of Tennessee reversed the judgment of the Chancery Court of Hamilton County, Tennessee entered October 25, 1976. The decree of March 7, 1977 of the Supreme Court of Tennessee is the final judgment of the highest court of the State of Tennessee.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, dated March 7, 1977, is not yet reported. Copies of the decree and opinion are attached as Appendices A and B. The opinions of the Chancery Court of Hamilton County are unreported. Copies of the opinions and final judgment of the Hamilton County Chancery Court are attached as Appendices C, D and J.

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Tennessee is conferred by 28 U.S.C. § 1257(2). *See Torcaso v. Watkins*, 367 U.S. 488 (1961); *Sherbert v. Verner*, 374 U.S. 398 (1963).

STATUTES INVOLVED

Tennessee Constitution, Article IX, Section 1, the validity of which is drawn in question, provides:

> "Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

The provisions of the Tennessee Constitution, Article IX, Section 1, were made applicable as a qualification for election to the 1977 limited constitutional convention of Tennessee by 1976 Tennessee Public Acts, Chapter 848, Section 4, which provides:

> "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

QUESTIONS PRESENTED

I. Whether the legislative call for a limited constitutional convention (1976 Tennessee Public Acts, Chapter 848, Section 4 establishing the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking the Tennessee Constitution, Article IX, Section 1) deprives appellant of the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution.

II. Whether the legislative call for a limited constitutional convention is an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution.

III. Whether the legislative call for a limited constitutional convention deprives appellant of the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV. Whether the legislative call for a limited constitutional convention deprives appellant of the right to be a candidate for public office in violation of the Equal Protection Clause of the Fourteenth Amendment.

V. Whether the legislative call for a limited constitutional convention deprives appellant of due process of law secured by the Fourteenth Amendment of the United States Constitution in that the Tennessee Constitution, Article 9, Section 1 is unconstitutionally vague.

VI. Whether the legislative call for a limited constitutional convention imposes a religious test as a qualification for office or public trust in violation of the United States Constitution Article VI, Clause 3.

STATEMENT OF THE CASE

Appellant, Reverend Paul A. McDaniel, pastor of the Second Missionary Baptist Church in Chattanooga, Tennessee filed as a candidate for delegate to the 1977 limited constitutional convention from the 29th House District of Tennessee. On September 28, 1976 Selma Cash Paty, one of the appellees here, filed suit in the Chancery Court of Hamilton County against appellant and certain of the appellees requesting a declaration that appellant was disqualified to serve as delegate and an order striking appellant's name from the ballot under 1976 Tennessee Public Acts, Chapter 848 and the Tennessee Constitution, Article IX, Section 1. (The original complaint of appellee Selma Cash Paty and appellant's original answer are included as appendices E and F).

The Chancery Court of Hamilton County on October 5, 1976 declared appellant eligible to seek the office of delegate and invalidated on First and Fourteenth Amendment grounds the provisions of 1976 Tennessee Public Acts, Chapter 848, and the Tennessee Constitution, Article 14, Section 1 as applied to appellant's candidacy for or service as a delegate at the 1977 limited constitutional convention.

(Appendix C) An appeal was taken to the Tennessee Supreme Court which on October 15, 1976 was remanded for failure of the record to reflect that the state attorney general had been made a party or served in accordance with Tennessee Code Annotated §23-1107 and Rule 24.04 of the Tennessee Rules of Civil Procedure.

On October 21, 1976 appellant filed an amended answer and cross complaint naming additional of the appellees as defendants in this case and seeking further relief. A copy of the amended complaint filed by appellant is included as Appendix G. The Chancellor certified appellants amended answer and complaint as a class action (Appendix H). The answer of appellee Selma Cash Paty to appellant's amended answer and cross complaint was filed October 22, 1976 and is included as Appendix I.

The Chancery Court of Hamilton County on October 22, 1976 again declared appellant qualified to seek the office of delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County (Appendix D) and on October 25, 1976 entered final judgment (Appendix J) and an order granting an appeal to the Tennessee Supreme Court.

During the pendancy of the appeal in the Tennessee Supreme Court, the election of November 2, 1977 was held and appellant was elected as a delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County by the following vote: Paul A. McDaniel - 4,570; Selma Cash Paty - 2,944; Samuel Lee Doney - 900; Ralph W. Timberlake - 743.

On March 7, 1977 the Tennessee Supreme Court entered a decree and opinion (Appendices A and B) reversing the judgment of the Chancery Court of Hamilton County

and directing that an order be issued by the clerk of the Tennessee Supreme Court certifying to the Governor, the Secretary of State and the legislative body of Hamilton County that a vacancy for the position of delegate to the 1977 limited constitutional convention exists in the 29th House District, Hamilton County, by virtue of Reverend Paul A. McDaniel's ineligibility and adjudging costs against Reverend Paul A. McDaniel. On March 16, 1977 appellant filed a notice of appeal to this Court from the final judgment of the Tennessee Supreme Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Appellant is a minister of the gospel within the meaning of the Tennessee Constitution, Article IX, Section 1. According to the decree of the Supreme Court of Tennessee, appellant is not qualified to hold the office of delegate to the 1977 Tennessee limited constitutional convention to which the people of the 29th House District of Hamilton County elected him by a substantial margin. The question raised by this case is, thus, closely akin to the question presented in *Torcaso v. Watkins*, 367 U.S. 488 (1961), in which this Court invalidated a Maryland law requiring a "declaration of belief in the existence of God" as a qualification for public office on the ground that it "unconstitutionally invades the appellant's freedom

of belief and religion." *Torcaso v. Watkins*, 367 U.S. at 496. The Tennessee Supreme Court distinguished *Torcaso* from the instant case—erroneously, it is submitted— on the ground that "Article IX, Section 1 [of the Tennessee Constitution] does not have the effect of forcing ministers and priests to profess a belief or disbelief in any religion." *Paty v. McDaniel*, Appendix B at 17. The Tennessee court's application of *Torcaso* is inconsistent with this Court's holdings that state classifications which penalize citizens for the exercise of *fundamental* rights can be justified only when *necessary* to promote a *compelling* governmental interest. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 331 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

It is difficult to comprehend how the Tennessee Supreme Court could conclude that the Tennessee Constitution, Article IX, Section 1 "does not infringe upon religious belief or religious action within the protection of the free exercise clause" and is only an "indirect burden" on the right of free exercise. *Paty v. McDaniel*, Appendix B at 17-18. The right of Reverend McDaniel to serve his congregation as a minister of the Gospel is a *fundamental* right secured by the free exercise clause. Few personal freedoms, if any, are of greater constitutional significance than the right of an individual to believe, preach and serve as minister to those of like religious persuasion. For invoking his free exercise right to be a minister of the Gospel, the State of Tennessee exacts a cruel penalty— it relegates Reverend McDaniel and other ministers to the level of second class citizenship. The Tennessee Constitution, Article IX, Section 1, presents Reverend McDaniel with a Hobson's choice: he must either forego his constitutionally protected right to be a minister of the

Gospel or abstain from the exercise of equally fundamental rights of voting and political candidacy. To suggest, as the Tennessee Supreme Court does, that it is "not religious belief, but the career or calling . . . that disqualified," *Paty v. McDaniel*, Appendix B at 8, ignores that appellant's pursuit of the career or calling of minister is a fundamental, constitutionally protected freedom, the exercise of which can not be conditioned upon forebearance of equally fundamental rights of voting and political candidacy.

The Tennessee Supreme Court concluded that the exclusion of ministers "from the law-making process of government is justified by the compelling state interest in maintaining the wall of separation between church and state." *Paty v. McDaniel*, Appendix B at 18. But no *state* interest in a "wall of separation" which diminishes *federal* rights of free exercise is compelling. Moreover, the asserted "compelling state interest" was based upon judicial notice taken of a series of highly dubious propositions for which no empirical authority was offered:

> . . . that ministers and priests could be expected, if and when serving in the Legislature, to do everything within their professional and spiritual powers of persuasion to further the aims of religion by sponsoring, advocating and voting for legislation that could or might violate both the free exercise and establishment clauses of the First Amendment; that without regard to the degree of success they might achieve, such activity would constitute a devisive force sufficient to constitute a significant

> violation of the Doctrine of Separation of church and state; that history will reflect that all governmental action that has been condemned by the First Amendment and the judicial decisions interpreting same has been sponsored and enacted by religiously motivated members of the legislature in direct response to the leadership of religious sects; that the effectiveness of that religious leadership in the governmental sector would be greatly enhanced by the presence in the State's highest deliberative bodies of ministers and priests. *Paty v. McDaniel*, Appendix B, at 14-15.

The Tennessee Supreme Court has painted with far too broad a brush. Absent reliable empirical evidence to the contrary, it should not be assumed that ministers and priests as a group are any more or less qualified for public office or any more or less supportive of the religion clauses of the First Amendment[1] than the population generally or other discrete occupational groups. It is patently unfair and inaccurate to conclude that all ministers elected to public office would "do everything within their powers to further the aims of religion" as the Tennessee Supreme Court assumes. Permanent and irrebuttable presumptions which are not necessarily or universally true in fact are disfavored. *See*, for example, *Vlandis v. Kline*, 412 U.S. 441 (1973). The Tennessee Constitution, Article IX, Section 1, conclu-

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[1] If anything, a stronger case could probably be made that the clergy as an occupational group are more supportive of the religion clauses than the population generally since support for civil liberties increases with educational level and most clergy have a higher educational level than the population generally.

sively presumes—erroneously, it is urged—that no ministers of the gospel or priests of any denomination whatever can "render unto Caesar the things which are Caesar's and unto God those things which are God's." *Matthew* 22:21.

The conclusive presumption of unfitness of ministers to hold public office legislatively attaints an entire occupational group in a manner closely akin to that proscribed by Bill of Attainder Clause of the United States Constitution, Article I, Section 9, Clause 3. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *United States v. Brown*, 381 U.S. 437 (1965).

In upholding the Tennessee Constitution, Article IX, Section 1, against appellant's free exercise claim, the Tennessee Supreme Court relied principally upon the authority of *Braunfeld v. Brown*, 366 U.S. 599 (1961). *See Paty v. McDaniel*, Appendix B, at 10-13. But *Braunfeld* is not dispositive of this case for several reasons. Appellant here is forced to choose between mutually exclusive rights of free exercise and equally fundamental rights of voting and candidacy. In contrast, appellants in *Braunfeld* were burdened only *economically* by the State's day of rest mandate in that the practice of their religious beliefs was made more expensive. *Braunfeld v. Brown*, 366 U.S. at 603, 605. State power to affect adversely commercial activity is far more extensive than state authority over fundamental political rights. *Compare*, for example, *Ferguson v. Skrupa*, 372 U.S. 726 (1963) with *Lubin v. Panish*, 415 U.S. 709 (1974). Second, the secular interest in a uniform day of rest arguably made *necessary* the Sunday law in *Braunfeld*. It has been said that the "effect of Tennessee's constitutional provision

prohibiting service [of ministers and priests] in the Generaly Assembly is to advance the state's goal of maintaining the separation between church and state." *Paty v. McDaniel*, Appendix B, at 13. However, separation between church and state can be maintained by alternative means far less intrusive of appellant's fundamental rights of free exercise of religion, voting and political candidacy:

> . . . the disqualification imposed by this statute is [not] a necessary means of maintaining permissible "separation of Church and State," of preventing "an establishment of religion." If the appellee should persuade a majority of his delegates to propose an amendment to the Constitution which would infringe upon religious liberty and if the electorate of the State should ratify such amendment, still the courts of the state and federal courts would stand ready, willing and able to strike it down before any harm could occur. *Paty v. McDaniel*, Appendix B, dissenting opinion at 4-5 (Brock, J., *dissenting*).

Third, the alleged intrusion upon free exercise rights in *Braunfeld* was temporally limited (one day a week) whereas the disability incident to appellant's right of free exercise here is total—he remains disqualified completely from certain public offices for which he is otherwise qualified so long as he remains a minister of the Gospel. While it is true that the non-establishment of religion may be "far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day," *Paty v. McDaniel*, Appendix B, at 13, the Tennessee Supreme Court failed to demonstrate that the state's asserted interest in separation of church and state could only be advanced by the Tennessee Constitution, Article IX, Section 1.

Appellant's free exercise claim is likewise supported by *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *Sherbert*, *Yoder* and *Barnette* each involved religious *activity* as opposed to religious *belief*. The ministry of Reverend McDaniel is a constitutionally protected, religious activity comparable to the refusal of the Seventh Day Adventist to work on the Sabbath in *Sherbert*; the refusal of Amish parents to permit public education of their children beyond the eighth grade in *Yoder* and the refusal of Jehovah's Witnesses to salute the flag in *Barnette*. The Tennessee Supreme Court erred in concluding that appellant's reliance on *Sherbert*, *Yoder* and *Barnette* was inapposite. *Paty v. McDaniel*, Appendix B, at 15-17. The religious activities of appellant here deserve protection equal to the religious actions protected in *Sherbert*, *Yoder* and *Barnette*. Unlike *Braunfeld*, the instant case does not involve a countervailing, strong state interest which can not be served otherwise than by a provision such as the Tennessee Constitution, Article IX, Section 1.

Reverend McDaniel's ministry of the Gospel admittedly involves *action* as well as belief. Appellant acknowledges that while the freedom to believe is absolute, the freedom to act is not. *Reynolds v. United States*, 98 U.S. 145 (1879); *State of Tennessee ex rel. Swann v. Pack*, _____ Tenn. _____, 527 S.W.2d 99 (1975). Reverend McDaniel's ministry, however, is action constitutionally protected by the free exercise clause because appellant's ministry does not implicate countervailing social interests in morality or personal safety involved in *Reynolds* or *Pack*. The free exercise claims in this case are, thus—contrary to the decree of the Tennessee Supreme

Court—governed by *Torcasso*, *Sherbert*, *Yoder*, and *Barnette* rather than *Braunfeld*. As this Court observed long ago, albeit in *dicta*, the free exercise clause of the First Amendment proscribes any law which would deny public office to one who takes an "active part in missionary work." *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952). Reverend McDaniel takes "an active part in missionary work" through his ministry—a role deserving of protection against civil disabilities under the free exercise clause. The right to public office, like the right to public benefits, *Speiser v. Randall*, 375 U.S. 513 (1958), should not be conditioned on the non-exercise of constitutionally secured liberties.

The disqualification of ministers under the Tennessee Constitution, Article IX, Section 1 is an anachronism handed down from the original Tennessee Constitution approved in 1796 and "derived from the 1776 North Carolina Constitution and the 1784 Constitution of the lost State of Franklin."[2] *See Paty v. McDaniel*, Appendix B, at 5-6 and Brief and Argument of Appellee Reverend Paul A. McDaniel in the Tennessee Supreme Court at 16 and Appendices I, II and III. (A copy of appellee's brief in the Tennessee Supreme Court *supra* was provided to the Court

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[2] The provision in the North Carolina Constitution of 1776 disqualifying ministers from legislative office was omitted from subsequent North Carolina Constitutions. **Compare** North Carolina Constitution of 1776, Article XXXI **with** North Carolina Constitution of 1868, Article VI, Section 5 and North Carolina Constitution of 1876, Article VI, Section 8, in 5 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 2793, 2815, 2836 (F. Thorpe, ed. 1909). Ministers and preachers of the Gospel were also disqualified from legislative office in Maryland. **See** Maryland Constitution of 1851, Article III, Section 11 and Maryland Constitution of 1867, Article III, Section 11 in 3 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS **supra** at 1722, 1791. Maryland's disqualification was recently invalidated on free exercise grounds. **Kirkley v. State of Maryland**, 381 F. Supp. 327 (D. Md. 1974).

in appellant's application to Mr. Justice Stewart for a stay denied March 17, 1977 in A-758).

Historically, along with compulsory taxation for religion, disqualification for public office was, prior to the establishment of our Constitution, one of the most common means of impairing religious freedom. *See* F. Swancara, "The Surviving Religious Test," 18 ST. LOUIS L. REV. 105 (1933). The geneology of the Tennessee Constitution, Article IX, Section 1 derives from a far less tolerant strand of our history antecedent to the Federal Republic, *see* F. Le Clercq, "The Emerging Federally Secured Right of Political Participation," 8 IND. L. REV. 607, 610 (1975), and was repudiated by the religion clauses of the First Amendment.

It is no accident that Jefferson's Virginia Statute Establishing Religious Freedom, upon which the First Amendment is based, addressed itself to disqualification for public office:

> . . . The proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right. 12 Henig, Virginia Statutes at Large 84.

Thus, the operative section of the Virginia statute provided that no person "shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all [persons] . . . shall be free to profess, and by argument to maintain, their opinion in matters of

religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities."

Appellant here asks no more than the free exercise clause of the First Amendment and the Virginia Statute Establishing Religious Freedom authored by Jefferson upon which the free exercise clause of the First Amendment was based, were intended to secure: that Reverend McDaniel's religious opinions, professions or activities should in no wise diminish his civil capacities.

II.

Appellant below urged that the Tennessee Constitution violates the establishment clause upon the authority of *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engle v. Vitale*, 370 U.S. 421 (1962); *School District v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 601 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975). Certain controlling constitutional guidelines have emerged from previous establishment clause litigation. *See* F. Le Clercq, "The Monkey Laws and the Public Schools: A Second Consumption", 27 VAND. L. REV. 209, 214-26 (1974). First, the law or act in question must reflect a clearly secular legislative purpose. Second, it must have a primary effect which neither advances nor inhibits religion; and, thirdly, it must avoid excessive government entanglement with religion. The 1976 call to the limited constitutional convention incorporating the Tennessee Constitution, Article IX, Section 1, thereby

excluding ministers as delegates, runs afoul of each of the three approved Establishment Clause guidelines.

Purpose. The Tennessee Constitution, Article IX, Section 1, has an avowedly religious purpose—to prevent Christian ministers and priests from "being diverted from the great duties of their functions."[3] It is immaterial whether the effect of the Tennessee Constitution, Article IX, Section 1, is to favor or to penalize ministers and priests. The original purpose—albeit benificent or punitive—was clearly non-secular and sectarian. The Tennessee Supreme Court did not rebut appellant's religious purpose argument but responded only: "We disagree with that interpretation." *Paty v. McDaniel*, Appendix B, at 18.

Legislation initially enacted for non-secular purposes can, of course, be upheld upon showing of an evolution of legislative purpose from religious to secular concerns. *See McGowan v. Maryland*, 366 U.S. 420 (1961) and *Braunfeld v. Brown*, 366 U.S. at 602. In contrast to *McGowan* and *Braunfeld*, it is impossible to discover or articulate an evolving secular legislative purpose sufficient to uphold the Tennessee Constitution, Article IX, Section 1.

The Tennessee Supreme Court's effort to recast Article IX, Section 1, of the Tennessee Constitution "to embrace the counterparts of ministers, priests and rabbis in every religious sect whatever may be their title or designation," *Paty v. McDaniel*, Appendix B, at 18, diminishes, but

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[3] The placement of the provision disqualifying ministers and priests from serving in the legislature in the same constitutional article with a test oath similar to the one invalidated in **Torcasso** was by design. **See** Tennessee Constitution of 1796, Article VIII, Sections 1 and 2 in E. SCOTT, LAWS OF TENNESSEE, 1715-1820, at 534. **See also** JOURNAL OF THE PROCEEDINGS OF A CONVENTION BEGAN AND HELD AT KNOXVILLE, JANUARY 11, 1796, at 23 (1796 ed., reprinted 1852).

does not eliminate, the provision's sectarian bias. (*See* IV, *infra*). As construed by the Tennessee Supreme Court, the provision purports to be—but, in fact, is not—ecumenical. (*See* IV and *entanglement*, *infra*.) Moreover, the gloss placed by the Tennessee Supreme Court on Article IX, Section 1 does not disturb appellant's claim that the original purpose of the Tennessee constitutional provision was religious and that the original purpose has not been supplanted by a legitimate secular interest.

Effect. The effect of the Tennessee Constitution, Article IX, Section 1, both advances and inhibits religion in violation of the establishment clause. The provision amounts to an advancement of religion because its effect is to prevent ministers and priests from being diverted from their religious tasks. The provision inhibits religion because it imposes a civil penalty on free exercise rights.

While the Tennessee Supreme Court's construction of Article IX, Section 1 may diminish the scope of claims that the provision "aid[s] one religion . . . or prefer[s] one religion over another," *Everson v. Board of Education*, 420 U.S. at 15, the Tennessee Supreme Court's opinion does not affect appellant's claim that Article IX, Section 1 of the Tennessee Constitution, as construed, "aid[s] all religions." *Everson v. Board of Education*, 420 U.S. at 15. The Tennessee Supreme Court in one instance conceded that the disqualification of ministers from public office was an aid to religion:

> . . . it is also true that a minister or priest is faced with the choice of abandoning either his leadership role in religion or any hope of serving the people of his district in the State Legislature. *Paty v. McDaniel*, Appendix B, at 7.

Although appellant urges that the dilemma posed by this hypothetical is unrealistic, the presumed effect of the Tennessee Supreme Court's decree would be to advance religion by enhancing the effectiveness of church leadership.

Appellant also urges that the constitutional disqualification of ministers from legislative office in Tennessee *inhibits* religion in a manner proscribed by the establishment clause. This Court has observed that because of the establishment clause, "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." *Everson v. Board of Education*, 330 U.S. at 15-16. Reverend McDaniel's ministry is inextricably interwoven with the entertainment and profession of his religious beliefs with which the State of Tennessee can not interfere under the establishment clause. Reverend McDaniel's ministry is closely related to his church attendance and reflects the leadership position he occupies in his congregation. *Everson* stated that it is unconstitutionally impermissible for the state to punish citizens for church attendance. By analogy, it should likewise be impermissible for the state to punish citizens for accepting leadership roles in their congregations and expressing their religious beliefs through the ministry. Christian ministry, though by no means restricted to pastors, is often an outgrowth of belief and church attendance.

The Tennessee Supreme Court apparently contradicted its conclusion that the constitutional disqualification of ministers from legislative office "simply does not impose any burden, direct or indirect upon religious belief or religious action" with its admission that there is

> . . . some validity in describing the effect of Article IX, Section 1, as prohibiting legislative service because of a person's leadership role in a religious faith. *Paty v. McDaniel*, Appendix B, at 7-8.

The Tennessee Supreme Court expressed fear that religious strife would be fomented by the candidacy of ministers—a fear that Brock, J., *dissenting* found "unpersuasive" and without basis. *Paty v. McDaniel*, Appendix B, at 9-10 and dissenting opinion, at 5. As Brock, J., observed in his dissent, the "national government and the 49 other states get along very well without such a disqualification of ministers." *Paty v. McDaniel*, Appendix B, dissenting opinion, at 3.

The convoluted "separation of church and state" rationale adopted in the majority opinion of the Tennessee Supreme Court represents an extreme position incompatible with this Court's effort to allow for "play at the joints" and to accommodate competing free exercise and establishment claims whenever possible. The establishment clause of the federal constitution obviously provides no support for the position of the Tennessee majority since neither ministers nor priests are disqualified from candidacy for any federal elective office. The Tennessee Supreme Court's mandate declaring a "wall of separation between church and state" is a *state* constitutional doctrine which deprives fundamental rights secured by the free exercise and establishment clauses of the federal Constitution.

It is correct, as the majority below suggested, that numerous First Amendment decisions of the Supreme Court reflect that one of the purposes of the establishment clause is to prevent political campaigns from degenerating

into battles between religion and non-religion or which pit one religion against another. *Paty v. McDaniel*, Appendix B, at 10. The majority opinion below failed to establish, however, that the danger of political cleavage along religious lines would be significantly increased if ministers and priests were permitted to seek legislative office. The fears of the Tennessee majority do not appear warranted when one considers that ministers and priests are not disqualified from a wide range of public offices in Tennessee—governor, mayor, city councilman, sheriff, squire or judge—and the campaigns for such offices have not significantly increased political cleavage along religious lines.

Even assuming that the candidacy of ministers or priests for legislative office would unleash the "potentially 'divisive forces'" feared by the Tennessee majority, appellant contends that, on balance, the danger is not sufficient to override his free exercise and establishment claims. The Tennessee court's apprehensions appear unwarranted upon the basis of the federal experience, the experience in other states and the experience in Tennessee as applied to offices outside the scope of Article IX, Section 1 of the Tennessee Constitution.

Entanglement. The Tennessee Constitution similarly raises difficult entanglement problems. The courts are, of course, arms of the state. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Can courts assume the responsibility for deciding who are ministers of the Gospel or priests without becoming embroiled in religious controversy? *See*, for example, *Serbian Eastern Orthodox Diocese for U. S. of American and Canada v. Milivojevich*, 44 U.S.L.W. 4927 (U.S. June 21, 1976).

There are no judicially manageable standards for determining who are ministers and priests subject to the Tennessee Constitution, Article IX, Section 1. Who counts as a minister or priest is a *religious* question upon which there are substantial differences among various religious traditions. The spector of entanglement is raised because legislatures and courts could resolve these differences only by reference to *religious* or *theological* norms. A few examples may suffice.[4] (Some of these examples reinforce appellant's vagueness claims at IV, *infra*.)

One of the essential differences between Luther and the Roman Catholic Church turned on the definition and role of the priesthood. In opposition to the hierarchial organization of the Roman Church whose priesthood was legitimated by apostolic succession—the laying on of hands going back to Peter—Luther's concept of the "priesthood of all believers" drew no distinctions between ministers and the laity. Thus, Luther declared that "[a]ll of us who believe in Christ are *priests* and kings in Christ." "The Freedom of a Christian" in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 63 (J. Dillenberger, ed. 1961) (emphasis added).

Who counts as a priest or minister is at the crux of the ecumenical movement. If Roman Catholic or Episcopal concepts of apostolic succession are applied, neither appellant nor any other Baptist clerics are, in truth, ministers or priests since they are not participants in the ritual of laying on of hands tracing back to Peter.

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[4] The writer is indebted to Professors Charles Reynolds and Stan Lusby of the University of Tennessee Department of Religious Studies for much of the following "entanglement" argument.

The Book of Mormon which establishes church policy for Mormons places responsibility on the elder males who share church responsibility and authority. Every Mormon —at least, every male Mormon—upon coming of age is expected to enter the "priesthood"—that is, to accept the call to become a missionary for a period of two years.

In the Moslem structure, there are no priests or ministers. Mohammed is regarded as the instrument of God whose ways are made known in the Koran. The faithful have a straight path to the deity. Although there are religious scholars, the precepts of the faith make ministers and spiritual advisors unnecessary.

Among Free Will Baptists one becomes a minister by being called by God. No other requirements or special training are imposed. Are courts capable of deciding who has been "called by God"? *See United States v. Ballard*, 322 U.S. 78 (1944).

Southern Baptists, in contrast, require not only that one be called by God to the ministry but that this call be affirmed by a congregation.

In the "churches of the laity," no special training or education is required of the "preachers." The "preacher" is expected to follow an occupation during the week to earn his living and to preach the word of God on Sunday. In churches of the laity, each member is a potential minister and many different members may serve as preachers from time to time. The church-of-the-laity tendency can be found in more hierarchically organized churches as well. Is a "Catholic worker" priest who is employed on the assembly line or in the fields of "priest" or just a worker for the purposes of the Tennessee Constitution, Article IX, Section 1?

In sum, one must conclude that the drafters of the Tennessee Constitution, Article IX, Section 1, and the majority of the Tennessee Supreme Court in the *McDaniel* case acted within a very narrow, established church frame of reference and understanding. It would be a great mistake for the society to permit the states to exclude ministers and priests from public office because this would inevitably require some agency of the state—executive, legislative or judicial—to resolve religious questions as to who are ministers with regard to which there are substantial religious differences. The Tennessee Constitution, Article IX, Section 1, runs afoul of the teaching of *Everson* that all religions be treated alike despite the Tennessee Supreme Court's liberal construction of the statute. The *McDaniel* opinion of the Tennessee majority does not treat all religions alike because it falsely assumes that all religions and denominations have hierarchical organizations with a clearly dileneated priesthood. This assumption overlooks the rich diversity of this nation's pluralistic religious structure. The principal purpose of the "entanglement test" was to guard against the danger of state involvement in such essentially religious questions as to who are ministers or priests and to prevent the state from favoring or penalizing any religious group because of its peculiar organizational structure or lack thereof.

III.

Appellant contends that the decree of the Tennessee Supreme Court deprives him of fundamental, federally secured rights of voting and political candidacy. *See* F. Le Clercq, "The Emerging Federally Secured Right of Political Participation," 8 IND. L. REV. 607 (1975). Appellant relies upon the authority of *Lubin v. Panish*, 415 U.S. 709 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *O'Brien v. Skinner*, 414 U.S. 524 (1974); *American Party v. White*, 415 U.S. 767 (1974); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Turner v. Fouche*, 396 U.S. 346 (1970); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D. Ga. 1969), *appeal dismissed sub. nom. Matthews v. Little*, 397 U.S. 94 (1970); *Matthews v. Little*, 396 U.S. 1223 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23, (1968); *Carrington v. Rash*, 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Baker v. Carr*, 369 U.S. 186 (1962); *Corfield v. Coryelle*, 6 Fed. Cas. 546 (No. 3230) (C.C. E.C. Pa. 1823)

Voting Rights. An important aspect of the right to vote is the right to vote for the candidate of one's choice. Article IX, Section 1 of the Tennessee Constitution and the 1976 legislative call for a limited constitutional convention dilute appellant's fundamental right to vote for persons of his choice. Since the right to vote is fundamental, state intrusion can not be justified unless necessary to serve a compelling interest. The exclusion

of ministers and priests from candidacy for certain public offices serves no rational purpose. The Article IX exclusion would not satisfy even the rational basis test of *Turner v. Fouche*, *supra*. The exclusion obviously could not survive the far more demanding standard of "strict scrutiny." As a voter, appellant is assured by the Equal Protection Clause of the Fourteenth Amendment that no class of potential candidates for public office will be aribtrarily disqualified. In a democratic society, the voters should determine the officers by whom they are to be governed. The fact that voters may occasionally choose to be represented by clerics—the recent election of Robert Drinnan to the U. S. Congress from Massachusetts comes to mind—is a matter best left to the ballot box than to the legislature or the courts.

The lack of a compelling state interest to support Article IX also arises by inference from its limitation to officers in "either House of the Legislature". Were the state interest truly compelling, it would be difficult to explain how the exclusion does not apply to other important state offices in Tennessee—for example, the office of Governor. *See* Tennessee Constitution, Article III, Section 3.

The majority opinion of the Tennessee Supreme Court conceded that the disqualification of ministers and priests from state legislative office was a "burden on the freedom to act in the governmental sector." *Paty v. McDaniel*, Appendix B, at 10. The burden is impermissible because of the "lack of necessity of this statute as a means of protecting a paramount or compelling state interest." *Paty v. McDaniel*, Appendix B, dissenting opinion, at 5 (Brock, Jr., *dissenting*).

The majority opinion below attempted to justify the exclusion of ministers and priests from legislative office because they "occupy a very special position in our society, and that by virtue of their position, they have an influence upon many of their fellow men, that others cannot exert." *Paty v. McDaniel*, Appendix B, at 14. Brock, J., *dissenting* found "no weight" in that argument but concluded that "even if this were true, it is an advantage which the state has no compelling interest in preventing." *Paty v. McDaniel*, Appendix B, dissenting opinion, at 4. The effort to fence out ministers and priests from candidacy for public office must fail because it is an irrational intrusion upon voter choice. It must fail just as the effort to fence out the military failed in *Carrington*; the efforts to exclude the indigent failed in *Harper*, *Matthews*, *Bullock* and *Lubin*; and the effort to exclude non-property holders failed in *Turner* and *Kolodziejski*.

Rights of Political Candidacy. A federally secured right of political candidacy emerges from the recent cases involving candidacy. Political candidacy is closely related to important rights of association and speech secured by the First Amendment, a fact which has been recognized by the Supreme Court at least since 1968 in *Williams v. Rhodes*, *supra*. The filing fee cases — *Matthews*, *Lubin*, *Bullock* — clearly establish a right of candidacy which can be asserted by candidates *qua* candidates rather than just derivatively by voters.

Reverend McDaniel asks this court to vindicate his fundamental right of political candidacy. The strict scrutiny standard is triggered unless, as is probably the case, the exclusion of ministers from candidacy can not be justified even under the less stringent rational basis standard. The disqualification of ministers and priests

as delegates by Article IX and the 1976 call to the limited constitutional convention fails to pass muster under the Equal Protection Clause because the provision is not necessary to support a compelling state interest. Nothing in *Everson* can fairly be construed "to mean that an official of the state or Federal government, in his capacity as private citizen, is prohibited from participating in religious affairs or that a member or leader of a religious organization is forbidden from participating, as a private citizen, in his state or federal government." *Paty v. McDaniel*, Appendix B, dissenting opinion at 4 (Brock, J., *dissenting*).

IV.

Vagueness. The Tennessee Supreme Court's construction of Article IX, Section 1 of the Tennessee Constitution, *Paty v. McDaniel*, Appendix B, at 18, does not dispose of appellant's vagueness claim. Appellant argued that the constitutional provision disqualifying ministers and priests from legislative office was unconstitutionally vague upon the authority of *Epperson v. Askansas*, 393 U.S. 97, 112 (1968) (Black J., *concurring*) and *NAACP v. Button*, 371 U.S. 415 (1963). *See also Thornhill v. Alabama*, 310 U.S. 88 (1940); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Gooding v. Wilson*, 405 U.S. 518 (1972). The problems of vagueness remain even after the state court's definitive construction of the challenged constitutional provision. The Tennessee majority did not address itself to a number of vexing questions raised by appellant below. Does the disqualification of ministers apply equally to part time or lay ministers? To ordained ministers who are not presently serving a particular congregation? (If Reverend McDaniel resigned his position as pastor of the Second Missionary Baptist Church in Chattanooga, would he not remain a "minister of the gospel" within the meaning of the disqualification?) Many Biblical

references support a broad concept of ministry, in effect, coextensive with the "chosen few" or the "Christian elect." *See*, for example, 2nd *Corinthians* 3:5,6 and *Isaiah* 61:6. How does the Tennessee Constitutional disqualification affect denominations or religions which consider each member a minister? Would anyone speaking at a meeting of the Society of Friends be considered a minister within the scope of the Tennessee constitutional disqualification?[5] Would the disqualification apply to the elders or other formally or informally organized group of church leaders of congregations which have no minister or priest? Could the disqualification be constitutionally applied to such elders without applying it to persons occupying similar roles in other denominations? *See Fowler v. Rhode Island*, 345 U.S. 67 (1953). Does the Tennessee constitutional disqualification apply equally to defrocked ministers or priests? What persons, if any, among Christian Scientists, Ethical Culturists or Buddhists would fall within the disqualification? The opinion of the majority below makes no pretense of addressing these difficult problems, some of which are probably insoluble. Counsel submits that the courts are ill suited to the task of deciding such questions.

V.

Religious Tests as a Qualification for Office. The United States Constitution, Article VI, Clause 3 provides:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

[5] Compare T.C.A. 36-415

The religious test clause clearly applies to candidacy for state legislative office. The purpose of the clause on its face was to bind all federal and state officers to support the Constitution as defined in the immediately preceding supremacy clause. The qualifying phrase "under the United States" no more limits the religious test clause to federal officers than the clause limits the oath to support the Constitution to federal officers. As originally offered by Mr. Pinckney of South Carolina, the Religious Test Clause of the United States Constitution, Article 6, Clause 3, applied to offices "under *the authority of* the United States" 2 Farrand, *Records of the Federal Convention* 468 (1973) (emphasis added). The words, "the authority of" were deleted to assure the applicability of the religious test clause to offices under authority of the states as well as of the United States. The fact that Article VI, Clause 3 of the United States Constitution follows the Supremacy Clause—the most formidable restriction on state authority in the Constitution—reinforces the plausibility of the argument that Article IV, Clause 3, was intended to apply with equal force at the state and federal levels. The Tennessee Constitution, Article IX, Section 1 amounts to a test oath abhorent to our tradition, *Girouard v. United States*, 328 U.S. 61 (1946) and offends the religious test clause of the United States Constitution, Article VI, Clause 3. *See In re Summers*, 325 U.S. 561, 576 (1945) (Black, J., *dissenting*).

Even should the Court decide that the religious test clause as originally adopted did not apply to the states, it is apparent that a right so fundamental has been incorporated by the due process clause of the Fourteenth

Amendment and is now applicable to the states. *Compare Gitlow v. New York*, 268 U.S. 652 (1925).

CONCLUSION

The constitutional questions presented by this appeal are substantial and of great public importance. The case is one of first impression at the federal appellate level. It is respectfully submitted that probable jurisdiction should be noted. The judgment of the Tennessee Court should be reversed both on the merits and as to costs with allowance of attorney fees to appellant. *See* 42 U.S.C. 1976*1*(e).

Because of the imperative public need that the questions presented here be resolved prior to the convening of the limited Constitutional Convention on August 1, 1977, appellant urges that, should the Court note probable jurisdiction, this case be given expedited consideration on the docket.

Respectfully submitted,

FREDERIC S. LE CLERCQ
1505 W. Cumberland
Knoxville, Tennessee 37916

J. THOMAS MANN
THOMAS, LEITNER, MANN,
WARNER & OWENS
330 Pioneer Bldg.
Chattanooga, Tenn. 37402

Attorneys for Appellant

By: _____
FREDERIC S. LE CLERCQ

CERTIFICATE OF SERVICE

Copies of this Statement as to Jurisdiction have been served upon The Honorable Brooks McLemore, Attorney General of Tennessee, Kenneth R. Herrell, Assistant Attorney General of Tennessee and Selma Cash Paty, Esq., counsel for appellees in this proceeding by placing same in the United States mail with sufficient postage directed to their respective office addresses on this the 11th day of April, 1977.

FREDERIC S. LE CLERCQ
1505 W. Cumberland
Knoxville, Tennessee 37916

J. THOMAS MANN
THOMAS, LEITNER, MANN,
WARNER & OWENS
330 Pioneer Bldg.
Chattanooga, Tenn. 37402

Attorneys for Appellant

By: _____
FREDERIC S. LE CLERCQ

APPENDIX A

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1976

SELMA CASH PATY (No. 51094)
Vs.
REV. PAUL A. McDANIEL, ET AL
} Hamilton Equity Reversed

DECREE

(Filed March 7, 1977)

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Hamilton County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed, and that the costs of the cause are adjudged against Appellee, Rev. Paul A. McDaniel, for which let execution issue.

By certified copy of this Order, together with a copy of the Court's Opinion, it is hereby certified to the Governor of the State of Tennessee, the Secretary of State, and the Legislative Body of Hamilton County that a vacancy exists in the office of delegate to the 1977 Tennessee Constitutional Convention from the 29th House District, Hamilton County, by virtue of Reverend Paul McDaniel's ineligibility.

Wm. H. D. Fones, J.
Robert E. Cooper, C.J.
Joseph W. Henry, J.
William J. Harbison, J.

(Certification of Supreme Court Clerk Omitted)

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SELMA CASH PATY, Appellant	)	Hamilton Chancery
VS	)	Honorable Herschel P. Franks, Chancellor
REV. PAUL A. McDANIEL, ET AL., Appellees	)	

For Appellant:

Selma Cash Paty
Pro Se
Chattanooga, Tennessee

Brooks McLemore
Attorney General
Nashville, Tennessee

Kenneth R. Harrell
Assistant Attorney General
Nashville, Tennessee

For Appellees:

J. Thomas Mann
Thomas, Leitner, Mann,
Warner & Owens
Chattanooga, Tennessee

Frederic S. Le Clercq
Knoxville, Tennessee

REVERSED WM. H. D. FONES, J.

OPINION

(Filed March 7, 1977)

[2]

The major issue in this case is whether the Tennessee Constitutional provision declaring ministers of the gospel and priests of any denomination whatever, ineligible to a seat in either house of the Legislature, violates the free exercise clause of the First Amendment to the Federal Constitution.

Public Acts 1976, Chapter 848, the Legislative call for a limited constitutional convention, established the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking Article IX, Section 1 of the Constitution of Tennessee that provides:

> "Section 1. ***Ineligibility of ministers and priests to seats in legislature.*** —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

Appellant, Selma Cash Paty, a candidate for the office of delegate to the 1977 Constitutional Convention from the twenty-ninth (29th) district of Hamilton County, brought this suit to have appellee, Reverend Paul A. McDaniel, an opposing candidate, declared ineligible to serve, and to remove his name from the ballot.

Appellee defends on the grounds that Article IX, Section 1, violates the free exercise and establishment clauses of the First Amendment to the Constitution of the United States, and the equal protection clause of the Fourteenth Amendment.

The Chancellor observed that:

> "The free exercise of religion must include the right to be a minister of the gospel as this is a tenet of the individual's belief."

He held that the exclusion of ministers from public office infringes upon the free exercise of religion guaranteed by the First Amendment and is therefore void.

[3]

Appellant insists that the exclusion of ministers fortifies the doctrine of separation of church and state, is directed against a profession, not the exercise of religion, and that it is a natural and reasonable classification rather than a constitutionally impermissible invidious, arbitrary or capricious one.

In the trial court, appellant called appellee as her witness and established that Reverend McDaniel is pastor of the Second Missionary Baptist Church in Chattanooga; that he considers the ministry to be a profession and one of his many duties as such is to lead people to salvation; that if elected as a delegate to the 1977 Constitutional Convention he would not resign as a minister of the gospel, nor as pastor of the church he now serves. On cross-examination it was established that Reverend McDaniel has a Bachelors Degree in Political Science from Moorehead College, a Masters of Divinity from Colgate-Rochester Divinity School and a Masters in Sociology from the

University of Rochester. Appellee testified that he could carry out his duties as a minister while serving as a delegate to the Constitutional Convention and that he had no knowledge of any objection on the part of his church to his candidacy or service as a delegate.

Upon its first arrival in this Court, the case was remanded to cure the deficiency of failure to make the Attorney General of Tennessee a party. T.C.A. §23-1107, Rule 24.04,

[4]

T.R.C.P., *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949); *Buena Vista Special School District et al. v. Board of Election Commissioners, et al.*, 173 Tenn. 198, 116 S.W.2d 1008 (1938) and *Cummings v. Shipp*, 156 Tenn. 595, 38 S.W.2d 1062 (1928).

Upon remand, the Attorney General waived appearance in the trial court so that an expedited appeal to this Court might result in a decision before election day. That objective proved to be unattainable and he has filed, at the direction of the Court, a brief addressing all of the issues. He joins appellant in urging the constitutionality of Article IX, Section 1.

It has long been the established law that the First Amendment to the United States Constitution is applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

It is, of course, our responsibility to examine the decisions of the United States Supreme Court for principles and guidelines applicable to and determinative of

the issues here, as that Court is the ultimate expounder of the United States Constitution.

But, in our view, we are also required to give weight to the well-established principle that courts must indulge every reasonable presumption of law and fact in favor of the validity of a state's constitutional provision that has been ratified by the people. *Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn. 1975); *Southern Railway Company v. Fowler*, 497 S.W.2d 891 (Tenn. 1973); *People v. Sours*, 31 Colo. 369, 74 P. 167 (1903); *State v. Alderson*, 49 Mont. 387, 142 P. 210 (1914); *Weeks v. Ruff*, 164 S.C. 398, 162 S.E. 450 (1932); *State ex rel. Morgan v. O'Brien*, 134 W.Va. 1, 60 S.E.2d 722 (1948).

[5]

I.

The history of Article IX, Section I reveals that it is identical to Article VIII, Section I of the original Tennessee Constitution, approved in 1796. That constitution was almost totally derived from the 1776 North Carolina Constitution and the 1784 Constitution of the lost State of Franklin. See, *Caldwell, Studies in the Constitutional History of Tennessee*, 77-101 (1907); see also *McClure, State Constitution Making*, 377-460 (1916).

Both North Carolina and Franklin had constitutional provisions prohibiting ministers from participating in government. North Carolina's read:

> "XXI. That no clergyman or preacher of the gospel shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function."
>
> *McClure* at 437

The State of Franklin's was identical. *Williams, History of the Lost State of Franklin*, 339 at 345, (1933). The North Carolina Constitution also prohibited "receivers of public monies," "officers in the regular army or navy," "agents supplying the army or navy" and "athiests" as well as other government officials from serving in the legislature. *McClure* at 405.

During our first constitutional convention, an attempt was made to prevent ministers from serving in "any civil or military office or place of trust within this state" as well as the general assembly. *Journal of the 1796 Constitutional Convention*, 18 (1796). The attempt failed, *Id.* at 23. The Constitutional Conventions of 1835 and 1870 were unlimited, and the subject provision was re-adopted by each Convention and ratified by a vote of the

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people of Tennessee. In the one hundred eighty (180) year life span of this constitutional provision no challenge to its validity has reached this Court. It may or may not be of significance that over the entire period of our statehood, no minister or priest has heretofore felt sufficient infringement upon his free exercise of religion, by virtue of ineligibility to serve in the Tennessee Legislature, to litigate the question.

II.

The only reported case our research has disclosed involving the identical issue we face in the case at bar, is *Kirkley v. State of Maryland*, 381 F.Supp. 327 (D. Maryland 1974). The U. S. District Court for the Dis-

trict of Maryland declared unconstitutional Article III, Section 11, of the Constitution of the State of Maryland prohibiting ministers or preachers of the gospel, or of any religious creed or denomination from service as Senator or Delegate. Defendants, the State of Maryland represented by the Governor and the Attorney General, for all intents and purposes, admitted the unconstitutionality of the provision and made no attempt to demonstrate any basis for the exclusion of ministers as State Legislators. The Attorney General of Maryland had issued an opinion expressing the view that the section in question was unconstitutional. He concluded, in part, that its inclusion in the Maryland Constitution was due to "a nineteenth century view of the ministry not particularly complimentary to that calling and not prevalent today." 381 F.Supp. at 331.

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The district judge added, "Another reason, no doubt, was to insure the separation of Church and State." *Id.* But, he observed that there are members of the clergy sitting in the Congress of the United States and in all probability in the legislatures of other states, and concluded that if this exclusion was necessary to insure the proper separation between church and state, the Federal Government would have done so.

The State of Maryland did not appeal from the decision of the district court.

We pause to examine the effect of the exclusion of ministers and priests from service in the legislature. It is not asserted by appellee that service in the General Assembly of Tennessee is a tenet of the Baptist faith, nor are we aware of any religious sect that asserts

that seeking and serving in public office is a religious duty. It is purely a secular activity. But, it is also true that a minister or priest is faced with the choice of abandoning either his leadership role in religion or any hope of serving the people of his district in the State Legislature. We also recognize that there is some validity in describing the effect of Article IX, Section 1, as prohibiting legislative service because of a person's leadership role in a religious faith.

But the question may well be asked, does it in fact impede the free exercise of religion? Those who believe that all religious leaders should devote their entire time to ecclesiasticism will insist that no true religious leader would be deterred from accepting or retaining that role, because of exclusion from state legislative service; that religious

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leaders entering the political arena as candidates for public office, and their service in public office, would be detrimental and degrading to all religions and represent the ultimate violation of the admonition "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[1] They would conclude that, at most, the Article constitutes a *de minimus* theoretical impediment to religion.

On the other hand, many would answer that it is a direct affront to all religion to disqualify the entire leadership of every religious sect from service in the state legislature and represents the ultimate in governmental interference with religion.

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[1] Matthew 22:21.

All rhetoric aside, the subject provision simply does not impose any burden, direct or indirect upon religious belief or religious action. It is not religious belief, but the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies. Ineligibility for service in the General Assembly in no way restricts religious action—except in the law making process of government—where religious action is absolutely prohibited by the establishment clause, as we read the decisions of the United States Supreme Court.

In *Everson v. Board of Education of Ewing TP.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1948), the Supreme Court said:

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

330 U.S. at 16.

[9]

Every First Amendment case with which we are familiar has involved governmental action said to interfere with religion or tend to favor one religion over another or favor all religious persons over non-religious persons. This case is unique, but clearly the above quoted sentence from *Everson* prohibits religious participation in the affairs of government to the identical extent that it prohibits governmental participation in religion. Parenthetically, a valid argument might be advanced that the case at bar is analogous to and the validity of our constitutional provision is supported by the decision in

Illinois ex rel McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 461 (1948), where utilization of tax supported public schools in aid of religious instruction was held to violate the establishment clause. The effect of the factual situation in *McCollum* may be said to have constituted religious interference with governmentally established secular institutions to promote religious goals. Of significance to the case at bar, the Court said:

> "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aim if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable."

333 U.S. at 212.

There is another consideration that, it seems to us, has significance on the issue under consideration. We can take judicial notice of the fact that Baptists, Methodists and Catholics separately and collectively, far outnumber other religious sects, both separately and collectively. Opening the

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door to service in the General Assembly by ministers and priests would grant a distinct advantage to ministers and priests of the three mentioned religions, over those of all other sects, because of the far more extensive voter base from which to launch a campaign for office. Also, political campaigns by ministers would naturally tend to pit religion against non-religion. The potentially

"divisive forces" considered significant in numerous First Amendment decisions of the Supreme Court are clearly present in sanctioning the candidacy of ministers and priests for legislative service.

We do not agree with appellee that the subject prohibition encroaches upon the freedom of belief of ministers and priests. We, of course, recognize the oft repeated interpretation that the First Amendment embraces two concepts—freedom to believe and freedom to act. "The first is absolute, but, in the nature of things, the second cannot be." *Cantrell v. Connecticut*, 310 U.S. 296 at 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

In our view, if any encroachment results from the ineligibility of ministers and priests to serve in the General Assembly of Tennessee it is an indirect burden on the freedom to act in the governmental sector. There the freedom of ministers and priests to act necessarily breaches the wall between church and state and collides with the establishment clause.

We are persuaded that *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), is sufficiently analogous to the case at bar to control its disposition. In

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Braunfeld, the Court sustained a Sunday closing law even though conceding that it undoubtedly served to make the practice of religious beliefs of Orthodox Jewish merchants more expensive. A distinction was made between legislation that imposes only an indirect burden on the exercise of religion, and legislation that attempts to make a religious practice itself, unlawful.

As members of the Orthodox Jewish faith, appellants were required by their religious beliefs to close their places of business from nightfall each Friday until nightfall each Saturday. They alleged, and their allegations were assumed to be true, as the case was before the Court on a motion to dismiss, that the Sunday closing law forced them to make a choice between giving up their Sabbath observance, a basic tenet of their religious beliefs, or suffer serious economic loss. They also asserted that the statute would hinder the Orthodox Jewish faith in gaining new adherents, subjecting their religion to discriminatory treatment in violation of the free exercise clause of the First Amendment. Appellant Braunfeld, alleged that he would be forced out of business and would lose his capital investment if he could not open on Sunday.

In analyzing the effect of the Sunday closing law the Court observed that the statute did not make unlawful any religious practices of appellants[2] or force them to say or

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believe anything in conflict with their religious tenets.[3]

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[2] In contrast with **Reynolds v. U. S.**, 98 U.S. 145, 25 L.Ed. 244 (1879), where a statute prohibiting polygamy collided with Mormon belief in duty of males to practice polygamy; and **Prince v. Commonwealth of Massachusetts**, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1943), where statute prohibiting sale of periodicals etc., in public places by girls under eighteen years of age collided with the Jehovah's Witness belief that it was a religious duty to perform such work.

[3] As in **West Virginia Board of Education v. Barnette**, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) where state action required school children to salute the flag, action contrary to the religious beliefs of appellees therein. The state action was invalidated with strong emphasis upon the fact that appellee's religious belief did not collide with rights asserted by any other individual.

". . . the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated —retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, ***still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.***" (Emphasis added)

366 U.S. at 605, 606.

Having concluded that the effect of the Sunday closing law upon appellants was the mere imposition of an indirect burden on the exercise of religion the Court continued:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.
>
> . . . .
>
> . . . if the State regulates conduct by enacting a general law within its power, the purpose and

> effect of which is to advance the State's secular goals, the
>
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>
> statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See Cantwell v. Connecticut, supra (310 US at pp. 304, 305)."

366 U.S. at 606, 607.

The Court found that Pennsylvania was justified in setting aside one day of the week as a day of rest, repose, recreation and tranquility; that it was beneficial to the public welfare to do so. Alternatives to designating Sunday as the single day of rest and exempting Sabbatarians were rejected as undermining the State's goal of providing a single day of rest.

The effect of Tennessee's constitutional provision prohibiting service in the General Assembly is to advance the State's goal of maintaining the separation between church and state, an imperative, constitutionally equal to the free exercise mandate. In our opinion, it is far higher on the scale of legitimate state goals than the mere convenience of having everyone rest on the same day, which sufficed in *Braunfeld*. If any burden can be said to be imposed upon the exercise of religion, it is indirect, minuscule, and does not make unlawful any religious practice. In all respects, the prohibition in the case at bar is upon firmer constitutional grounds than the Sunday closing law, sustained in *Braunfeld*.

But, the record in the case at bar contains neither facts, nor expert testimony to assist the Court in assessing the effect that voiding Article IX, Section 1 of our Constitution would have in breaching the wall between church and state. Appellant directs our attention to the not insignificant number

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of laws dealing with ministers as an occupation and generally conferring special privileges upon them as a class. Examples noted are their exclusion from the draft by the Selective Service Act of 1967, exclusion from jury service in Tennessee, the confidential communications statutes of this State and particular sections of the Internal Revenue Code all of which appellant implicitly asserts give ministers and priests special treatment. We are unable to perceive that any of the special legislation cited in appellant's brief dealing with ministers as an occupation provides any direct evidence in support of the allegations that their service in the State Legislature would violate the establishment clause of the First Amendment. However, such legislation does emphasize that ministers and priests occupy a very special position in our society, and that by virtue of their position, they have an influence upon many of their fellow men, that others cannot exert.

It seems to us that it can fairly be said, in affirmative support of appellant's position, that ministers and priests could be expected, if and when serving in the Legislature, to do everything within their professional and spiritual powers of persuasion to further the aims of religion by sponsoring, advocating and voting for legislation that could or might violate both the free exercise and establishment clauses of the First Amendment; that

without regard to the degree of success they might achieve, such activity would constitute a divisive force sufficient to constitute a significant violation of the Doctrine of Separation of church and state; that history will reflect that all governmental action that has been condemned by the First Amendment and the judicial decisions interpreting same

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has been sponsored and enacted by religiously motivated members of the legislature in direct response to the leadership of religious sects; that the effectiveness of that religious leadership in the governmental sector would be greatly enhanced by the presence in the State's highest deliberative bodies of ministers and priests. The present day religious wars in Ireland and Lebanon, that shook the conscience of all men of good will, everywhere, religious and non-religious, remind us that the human race has not advanced to a degree of civilization that will permit us to conclude that the fervor of religion will never again disturb and disrupt secular affairs and government. Out of its proper realm it is a force of awesome power and influence upon human conduct.

The later case of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), is similar in some respects to *Braunfeld*, and a different result was reached. However, the distinctions are clear and apparently represents no erosion of the *Braunfeld* decision.

In *Sherbert* appellant's religion prohibited Saturday labor. The textile mill where she had worked five days a week for two years, changed all three shifts to a six day week. She was unable to find other employment,

because of their unwillingness to depart from a basic tenet of the Seventh Day Adventist creed. Her application for unemployment compensation benefits was denied on the grounds that she had failed without good cause to accept suitable work. That ruling was sustained by the courts of South Carolina and reversed by the Supreme Court. The effect of South Carolina's action was analyzed as follows:

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> "For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, supra, 366 U.S., at 607, 81 S.Ct., at 1148. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakeable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."
>
> 374 U.S. at 404.

No compelling state interest to justify the infringement upon appellant's First Amendment right was asserted and proven to exist. The possibility that fraudulent claims

by insincere claimants would dilute the fund and hinder scheduling by employers of necessary Saturday work was rejected, having been asserted for the first time in the Supreme Court and there being no supportive evidence in the record. The Court also expressed doubt that these asserted interests could be shown to be sufficiently compelling to justify a First Amendment infringement.

The Court distinguishing *Sherbert* from *Braunfeld*, said:

> "In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v. Brown, supra. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served 'to make the practice of [the Orthodox Jewish merchants'] religious beliefs more expensive,' 366 U.S., at 605, 81

[17]

> S.Ct., at 1147. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers."
>
> 374 U.S. at 408.

Appellee insists that his free exercise claim is closely akin to the question presented in *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). Torcaso was refused a commission as notary public because he would not declare his belief in God. The Maryland Constitution provided that no religious test be

required for any office, except a declaration of belief in the existence of God. The Court said that the test oath is abhorent to our tradition and that neither a state nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." In our opinion, Article IX, Section 1 does not have the effect of forcing ministers and priests to profess a belief or disbelief in any religion. The test oath clearly intruded upon the freedom to believe or to disbelieve, and no state interest to justify its imposition was, or could be asserted.

Appellee also relies upon *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *West Virginia State Board of Education v. Barnette*, *supra* footnote 3, as involving constitutionally protected religious belief and action, comparable with his situation. In both cases the Supreme Court invalidated state action requirements that directly interferred with religious beliefs. In our opinion, the cases are inapposite.

We conclude that Article IX, Section 1, Constitution of Tennessee, does not infringe upon religious belief or

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religious action within the protection of the free exercise clause; that such indirect burden as may be imposed upon ministers and priests by excluding them from the law-making process of government is justified by the compelling state interest in maintaining the wall of separation between church and state.

III.

Appellee argues that Article IX, Section 1 amounts to an establishment of religion, in violation of the First and Fourteenth Amendments of the United States Constitution. This argument is predicated on the assumption that the provision applies only to ministers and priests of the Christian faith; that it was originally intended as a preference or benefit protecting them from diversion from the "great duties" of the pastoral function.

We disagree with that interpretation.

The word "priest" is defined in Webster's Third New International Dictionary, p. 1799-1800 (1971) as: "1: one who performs sacrificial, ritualistic, mediatorial, interpretative, or ministerial functions esp. as an authorized or ordained religious functionary or official minister of a particular religion."; and in the American Heritage Distionary Of The English Language, p. 1039 (1970) as: "2. A minister in a non-Christian religion. 3. One whose role is considered comparable to that of a priest."

We hold that the phrase ". . . priests of any denomination whatever" is intended to embrace the counterparts of ministers, priests and rabbis in every religion sect, whatever

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may be their title or designation.

The disposition we make of appellee's establishment clause contention also disposes of his assertion that Article IX, Section 1 is unconstitutionally vague.

IV.

Appellee's last federal constitutional contention is that Article IX, Section 1 amounts to state discrimination against himself and other ministers who wish to serve as delegates to the 1977 Constitutional Convention. We again disagree. The equal protection clause does not strike down every difference in the application of laws but rather is concerned with "invidious distinctions." *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). We do not find that the disqualification of ministers from seats in the Legislature amounts to such a distinction.

The United States Supreme Court has created two (2) tests for normally determining whether or not a particular state action violates the equal protection clause. In order to determine which test to apply the Court looks at: "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). If a state law or action makes a classification that infringes on a "constitutionally protected right" it must show a "compelling state interest" for that classification or it is unconstitutional. *Id.* at 339. However, if a non-fundamental right is in question, the state need only demonstrate that the classification is

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reasonably related to a premissible state interest. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Both parties rely on these tests in their opposing positions on the constitutionality

of Article IX, Section 1. But, in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) the Supreme Court has articulated a third test that we believe to be applicable here. The Court was faced with which standard should be applied to a state filing fee which could prevent poor persons from holding public office. The Court determined that a test more rigid than merely "a rational basis" but not seemingly as strict as requiring "a compelling state interest" should be applied. Chief Justice Burger spelled out the test that would be employed to evaluate classifications that infringed on the right to seek and hold public office:

> ". . . the law must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."
>
> 405 U.S. at 144.

Our examination of both Article IX, Section 1 and its legislative history reveals that the state's objective was and always has been to insure separation of church and state. While we are of the opinion that a compelling state interest undergirds Article IX, Section 1, the legitimacy of its objective is beyond question. We reject the contention that the subject article violates the equal protection clause of the Fourteenth Amendment.

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V.

Although the disposition we make of this case does not require that we address appellant's second assignment of error, we deem it appropriate to do so, because of its relevance if the ultimate result is contra.

The learned Chancellor decreed:

"That the portion of Section 4 of Chapter 848 of the Public Acts of Tennessee, 1976, which reads, '. . . who can qualify for membership in the House of Representatives of the General Assembly . . .', be and it hereby is declared to be in violation of the requirements of the First Amendment of the Federal Constitution.

That the requirements for the office of delegate to the 1977 Tennessee Constitutional Convention be and they hereby are declared to be determined by the general statutes on qualifications for office-holders, as set forth in the Code of Tennessee."

Appellant asserts that if Article IX, Section 1 is unconstitutional the remaining qualifications and disqualifications for membership in the House of Representatives of the General Assembly of Tennessee should control rather than the general statutes on qualifications for state offices. We also sustain appellant's second assignment of error.

There are significant distinctions between the qualifications for membership in the House of Representatives and those prescribed in the general statutes applicable to offices under the authority of this State, not otherwise specifically provided.[4]

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[4] See, Tennessee Constitution Article 2, §§9, 10, 25 and 26; Article 6, §7; Article 9, §1, Article 10, §3 and T.C.A. §§8-1801, 1803; §39-3219 and §40-2714.

[22]

Section 11 of Chapter 848, Public Acts of 1976 is an all inclusive rescue or savings clause. No extensive analysis is required of the doctrine of elision as applied in this State to support our conclusion that if the unconstitutionality of Article IX, Section 1 be conceeded, that single disqualification should be elided and the remaining qualifications and disqualifications for membership in the House of Representatives govern the eligibility of delegates to the 1977 limited constitutional convention. *See*, *Carr v. State ex rel Armour*, 196 Tenn. 256, 265 S.W.2d 556 (1954), *Davidson County v. Elrod*, 191 Tenn. 109, 232 S.W.2d 1 (1950); and *State v. Dunn*, 496 S.W.2d 480 (Tenn. 1973).

VI.

Reverend McDaniel filed a counter-complaint, cross-complaint and third party complaint on October 21, 1976, following this Court's remand of the first appeal. The action was brought on behalf of himself and all other ministers of the gospel, all priests of any denomination whatever, present and future, (1) who wish to seek election as delegates to the 1977 constitutional convention or any future constitutional convention and (2) who wish to seek election as members of either body of the General Assembly of this State; and as a class action on behalf of himself and all independent voters who (1) wish to vote for delegates to the 1977 limited constitutional convention and all future constitutional conventions, (2) who wish to vote for candidates for election as members of the House or Senate and (3) who wish to vote for ministers of the gospel or priests of any denomination whatever in the November 2, 1976, election or any future election

to a constitutional

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convention or to both bodies of the General Assembly of this State.

The Chancellor, having declared Article IX, Section 1 unconstitutional, granted the relief sought by Reverend McDaniel and all persons similarly situated composing the class of ministers of the gospel and priests of any denomination whatever who are candidates to serve as delegates to the 1977 limited constitutional convention and denied all other relief sought.

Reverend McDaniel appeals from the failure to grant relief to the other classes of persons described above.

We overrule all of the assignments of error relied upon by Reverend McDaniel. The Chancellor correctly held in his memorandum opinion that the issues raised on behalf of said classes do not present justicable controversies under the declaratory judgment statute because they are abstract, theoretical and based upon contingencies which may not arise. *Story v. Walker*, 218 Tenn. 605, 404 S.W.2d 803 (1966).

We hold that Article IX, Section 1, Constitution of Tennessee is free of Federal Constitutional infirmities. The result is that appellee, Reverend Paul McDaniel, a minister of the gospel, is ineligible to serve as delegate to the 1977 limited constitutional convention. He was the successful candidate in the November 2, 1976, election for delegate from the 29th District, Hamilton County, Tennessee. Section 6, Chapter 848, Public Acts of 1976 provides that any vacancy in the membership of the con-

vention from any representative district shall be filled by election of a qualified delegate by the legislative body of the county of residence of the

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delegate whose seat becomes vacant.

The judgment of the Chancery Court of Hamilton County, Tennessee, is reversed. The clerk of this Court will issue an order certifying to the Governor, the Secretary of State, and the legislative body of Hamilton County that a vacancy exists in the 29th House District, Hamilton County, by virtue of Reverend Paul McDaniel's ineligibility. Costs are adjudged against appellee.

/s/ WM. H. D. FONES
Wm. H. D. Fones,

Concur:

Cooper, C.J.
Henry, Harbison, JJ.

Brock, J., dissents (see separate opinion)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SELMA CASH PATY, Appellant,	)	Hamilton Chancery
V.	)	Hon. Herschel P. Franks,
REV. PAUL A. McDANIEL, ET AL., Appellees.	)	Chancellor

DISSENTING OPINION

I dissent from the decision and opinion of the majority.

In my opinion, Chapter 848, Public Acts of 1976,[1] insofar as it declares ministers of the gospel and priests of any denomination ineligible to serve as delegates to the Constitutional Convention of 1977, is violative of the (1) "free exercise" guaranties of the First Amendment to the Constitution of the United States[2] and Article 1, Sec. 3, Constitution of Tennessee and (2) the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

[2]

I cannot agree with the conclusion of the majority that ". . . the subject provision simply does not impose any

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[1] The majority opinion speaks, throughout, as if we were determining the validity under the U.S. Constitution of Art. IX, Section 1, Constitution of Tennessee. For the sake of clarity, I will speak only in terms of the statute before us.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

burden, direct or indirect upon religious belief or religious action." It is my view that the statute does, indeed, substantially and directly prohibit the free exercise of religion by the appellee and that no reason, consistent with the First Amendment, can be advanced to justify the prohibition.

The statute clearly prohibits a minister, who is otherwise qualified, from serving as a delegate in the Constitutional Convention of 1977. Thus, the appellee, who desires to be both a minister and a delegate, must purchase the right to be a delegate by giving up his right to continue to be a minister. The disqualification imposed upon the appellee is as much a burden, a penalty, as would be a fine or imprisonment imposed upon him for being a minister. It forces the appellee to make a choice between his right to be a minister and his right to participate in his state government as a delegate to the Constitutional Convention, both of which rights are, in my opinion, guaranteed by the First and Fourteenth Amendments. Thus, the statute confronts the appellee with the necessity of making the kind of choice which the Supreme Court held to be impermissible in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In that case the South Carolina statute forced the citizen to choose between her right to receive unemployment benefits and her right to practice her religion by keeping Saturday as the Sabbath. Pertinent here is the following statement of the Court:

[3]

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the other hand, and abandoning one of the precepts

> of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404.

But, does being a minister constitute an exercise of religion protected by the First Amendment? I should have thought that there could be no question that it does. However, the majority dispute that conclusion. It is not denied that one who performs the customary functions of a minister is exercising his religion, but it is asserted that one dedicated to such service may, because of that dedication, be barred from serving as a constitutional convention delegate, as a necessary means of maintaining "the separation of Church and State."

Such necessity is not evident to me. The national government and the 49 other states get along very well without such a disqualification of ministers. The First Amendment merely prohibits *laws* respecting the establishment of religion by government and *laws* which would prohibit the free exercise of religion; it does not require the "separation of Church and State" in all other respects. *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952). Particularly, it does not, in my view, prohibit a religious leader from participating in his government upon the same terms as other citizens, nor a government official from taking an active, even a leadership, role in a religious organization.

I think that the majority has misinterpreted and misapplied the decision in *Everson v. Board of Education of Ewing TP.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[4]

I have no quarrel with the quotation from that opinion that:

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa." 330 U.S. at 16.

However, I do not understand that statement to mean that an official of State or Federal government, in his capacity as a private citizen, is prohibited from participating in religious affairs or that a member or leader of a religious organization is forbidden from participating, as a private citizen, in his State or Federal government. To the best of my knowledge, the decision of the Court today is the first to hold to the contrary.

No doubt, Tennessee is free to go further in its efforts to insure "the separation of Church and State" than the First Amendment has gone; but, clearly it is circumscribed in that endeavor by the strictures of the First and Fourteenth Amendments. These Amendments require that a law which would restrict, diminish or burden the right to freely exercise one's religion can be justified only by "the gravest abuses, endangering paramount interests." *Sherbert v. Verner*, *supra* at 406; *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

In my view, the majority opinion advances no such justification for this statute. I find no weight in the argument that ministers, as candidates and as delegates, would have an undue advantage over other candidates and delegates, but even if this were true, it is an advantage which the State has no compelling interest in preventing.

Nor do I agree that the disqualification imposed by this statute is a necessary means of maintaining permissible

[5]

"separation of Church and State," of preventing "an establishment of religion." If the appellee should persuade a majority of his fellow delegates to propose an amendment to the Constitution which would infringe upon religious liberty and if the electorate of the state should ratify such amendment, still the courts of this state and the federal courts would stand ready, willing and able to strike it down before any harm could occur.

Finally, the fear that religious strife would be fomented by the candidacy of ministers is equally unpersuasive. I am not aware of any basis for such a fear.

The same lack of necessity for this statute as a means of protecting a paramount or compelling state interest which causes it to fail when tested by the First Amendment likewise compels the conclusion that it invidiously discriminates against ministers and, thus, violates appellee's right to equal protection of the law under the Fourteenth Amendment. See *In Re Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 69 (1968). No excuse, other than those hereinabove found to be wanting, is offered for denying to ministers the right to serve as delegates to the Constitutional Convention of 1977.

I would hold that this statute fails to pass muster under both the First and Fourteenth Amendments and affirm the decree of the Chancellor.

/s/ Ray L. Brock
BROCK, J.

APPENDIX C

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE, PART 2

SELMA CASH PATY	:	
VS.	:	NO. 51094
REV. PAUL A. McDANIEL, ET AL	:	

CHANCELLOR'S MEMORANDUM OPINION

(Filed October 5, 1976)

Plaintiff and Defendant have qualified as candidates at the State Constitutional Convention from the 29th District with the Hamilton Election Commission. Plaintiff seeks a declaratory judgment declaring the defendant ineligible to serve as a delegate to the Convention if elected.

The facts are undisputed and admitted in the pleading. The Defendant is a minister of the gospel within the meaning of the term as used describing qualifications of candidates for delegates to the Constitutional Convention.

The Legislature enacted a call for the Constitutional Convention which is published as Public Act 848. Section 4 of that Act established the qualifications of would-be candidates for delegates to the Constitutional Convention. The yardstick utilized by the Legislature is that the candidates for delegates shall be the same as for membership in the General Assembly. The Constitution of the State of Tennessee, Article IX, declares ministers of the gospel to be ineligible to sit in either house of the Legislature. The State law as written is clear to the effect that the Defendant is not eligible to serve as a delegate to the

Constitutional Convention if elected. The Defendant raises three defenses which will be discussed in the order raised. The Defendant contends that this Court is without jurisdiction to determine the issue, that the jurisdiction is vested exclusively in the delegates to the Constitutional Convention. This apparently was the law in Tennessee until 1974 when the Supreme Court decided a case of *Commer v. Ashe, et al*, 514 SW2d 730. The Supreme Court in that case held that prior to election day, courts of the State have jurisdiction and authority to determine the eligibility

[2]

of candidates; that is, whether the candidate is qualified to have his name appear on the ballot. The second defense contends that the complaint was not timely filed and that the parties cannot exhaust their legal remedies prior to the election on November 2. The Court feels this contention is without merit since both parties are in the same position insofar as any appellate reviews are concerned and the courts must remain open to a redress of any grievance brought with the right to the ultimate determination by appellate courts.

Finally, the Defendant attacks the constitutionality of 1976 Public Acts, Chapter 848, Section 4. This Court holds that under said Section 4 the legislative requirement that candidates for delegates to the Constitutional Convention must possess the same qualifications as that required for membership in the House of Representatives of the General Assembly is unconstitutional under the Federal constitution.

Ministers of the gospel and priests have been disqualified as a class in serving as delegates to the Constitutional Convention and a classification based upon exercise of rights is guaranteed against state infringement by the U. S. Constitution. A state may not deny to some the privileges of holding public office that it extends to others on the basis of distinction that violates Federal constitution guaranties. See *Turner v. Fouche*, 90 Supreme Court 532, at 541. The First Amendment to the U. S. Constitution provides in part: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*; . . ." (Emphasis supplied) The Fourteenth Amendment has rendered the legislators of the several states as incompetent as the congress to enact such laws. See *Cantwell v. State of Connecticut*, 60 Supreme Court 900, at 903.

The States limitations upon the right to run for public office place burdens on two different classes of rights. The right of the individuals to associate for the advancement of political belief and the right of the voters regardless of their political persuasion to cast their votes effectively. "Both of these rights, of course, rank among our most precious freedoms". *Williams v. Rhodes*, 89 Supreme Court 5, at page 10.

[3]

The Legislature has in effect denied the Defendant the right to qualify as a candidate on the sole basis that he is a minister of the gospel. The free exercise of religion must include the right to be a minister of the gospel as this is a tenet of the individuals religious belief. By freely exercising a religious belief, the Defendant is penalized at law and such requirement produces

a chilling effect upon the free exercise of religion, a constitutional right guaranteed by the First Amendment and is an infringement on the free exercise of religion by the individual.

A decree will be entered declaring the qualificational requirements in the aforementioned Section 4 of Chapter 848 as unconstitutional under the Federal constitution and the requirements for office of delegate is the general statutes on qualifications for office holders as set forth in the Code of the State of Tennessee.

The costs of the cause will be adjudged equally between the Plaintiff and the Defendant candidates since the Court's determination is mutually beneficial to the parties. Solicitor for the defendant shall submit an appropriate decree.

/s/ HERSCHEL P. FRANKS
CHANCELLOR - PART 2

APPENDIX D

IN THE CHANCERY COURT, PART 2,
FOR HAMILTON COUNTY, TENNESSEE

SELMA CASH PATY	)	
	)	
-vs-	)	NO. 51094
	)	
REV. PAUL A. McDANIEL, et als.	)	

MEMORANDUM OPINION

(Filed October 22, 1976)

This Court on October 6, 1976 entered a Final Judgment in this cause and granted an immediate appeal to the Supreme Court of Tennessee, and that Court entered an Order of Remand on October 15, 1976, declaring that this Court's invalidating the qualification provisions of Chapter 848, Section 4, Public Acts of 1976, on constitutional grounds is of no force and effect, on the ground that the Attorney General of this State was not made a party or served with a copy of the proceedings, since the constitutionality of an act of the Legislature was before the Court on a declaratory judgment action.

At the outset it should be noted that the call for the Convention by the Legislature was not exercising legislative authority (Article 2, Section 3, Constitution of Tennessee) but was acting as a special agency under constitutional powers found in Article 11, Section 3, Paragraph 2, of said Constitution. This distinction is clearly delineated in the case of *West vs. Carr*, 212 Tenn. 367, 370 S.W.2d 469, wherein the Supreme Court said, at page 377:

"The Constitution of Tennessee recognizes the fundamental difference between the power of its General Assembly to take final action—i. e., *to make law*—and the narrowly limited power of a constitutional convention to propose changes for submission to a vote of the people. It does this by making totally different provisions for the membership or composition of the two different bodies."

[2]

Again quoting from the same Opinion, at page 378, the Court quoted its earlier case of *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913, with approval, as follows:

"The power to 'alter, reform or abolish' the Tennessee Constitution resides in the people, not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all State authority. The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."

The issue in the original case, therefore, is not controlled by the limitations of the Constitution of the State of Tennessee, but whatever the people do in this regard is only limited by the restraints of the federal Constitution.

Upon the remand, the Attorney General of the State of Tennessee filed a Waiver and Acknowledgement in this cause on October 19, 1976, acknowledging copies of all pleadings and waiving service of process and the right to be heard or participate in these proceedings.

By Order of the Court defendant McDaniel was permitted on October 21, 1976 to file a Cross-Complaint and Third-Party Complaint in this cause against the original plaintiff, the Governor, the Attorney General, the Secretary of State, the Coordinator of Elections and the members of the State and County Election Commissions, seeking in his own right a declaratory judgment on the issues raised by the Cross-Complaint. The Court has heretofore by Order sustained this Cross-Complaint as a class action, and the original plaintiff and counter-defendant has filed an Answer, and the other mentioned parties have all accepted service of process and waived any required statutory notices and the right to participate and be heard in this Court on the issues raised in this cause. The plaintiff and counter-defendant and defendant and counter-plaintiff, parties to the original action, have filed a Stipulation that they do not wish to introduce any further proof in this cause and agree that the Court may render a final judgment upon the entire record before the Court at this time, including the factual Stipulation.

In effect, both candidates for delegate to the Constitutional Convention are now seeking a declaration by this Court as to whether or not Paul A. McDaniel is an eligible candidate for election as a delegate from the 29th Legislative District to the 1977 Tennessee Constitutional Convention. The Court is of the

[3]

opinion that this issue is proper for determination and reaffirms the reasoning in its prior Memorandum Opinion and incorporates by reference so much of that Opinion as relates to this precise issue.

The argument that the Legislature prohibits a minister of the gospel from participating as a delegate in a Constitutional Convention as an extension of the doctrine of separation of church and state and is fraught with danger, as can be shown by carrying to its logical extreme, that is, the passage of an enactment that would bar any religious person from serving in the representative capacity of a delegate to a Constitutional Convention. Under this reasoning, there would be total separation of religious influence on formulating the State's Constitutional provisions. This Court rejects this theory out of hand as being a specious argument. There is an important and Constitutionally sanctioned distinction between making laws effecting an establishment of a religion or prohibiting the free exercise thereof and the proposing of constitutional provisions by a body composed of persons professing strong religious convictions.

McDaniel seeks a further declaration by this Court that ministers of the gospel are eligible to serve as delegates to future Constitutional Conventions and that ministers of the gospel are eligible to serve in the future as members of the Tennessee General Assembly. He alleges "*he may be a candidate for election* as a delegate in future elections for delegates to a subsequent constitutional convention as well as a candidate for election as a member of the Tennessee House of Representatives or Senate in future elections" (emphasis supplied). In this connection the Tennessee Constitution restricts its amendment to not more often than once every six years. It is speculative and conjectural when and if again there will be a Constitutional Convention, and it is even more speculative as to whether the General Assembly in such a call would attempt to prevent ministers of the gospel from serving

as delegates. It is again alleged that McDaniel may be a candidate for the General Assembly. There is no statement that he intends to be, and, moreover, the record does not show that the issue raised by the pleading is capable of repetition, yet evading review by the Courts, which is the standard established for class action review. The Courts remain open to redress real controversies when they arise and are capable of resolving these speculative issues, should a real controversy develop. The Supreme Court, speaking in the

[4]

case of *Story vs. Walker*, 218 Tenn. 605, 404 S.W.2d 803, prescribes the scope of the declaratory judgment statute, at page 607, as follows:

> "'The policy of this Court, as several times declared, is that its discretion in rendering decrees under the authority of our Uniform Declaratory Judgment Act, Code, sec. 8835 et seq. "should be exercised with the utmost caution." *Newsum v. Interstate Realty Co.*, 152 Tenn. 302, 278 S.W. 56, 57, *Hinchman v. City Water Co.*, 179 Tenn. 545, 167 S.W.2d 986. Otherwise, the courts might be well projected into the "limitless field of advisory judgments.'
>
> Pursuant to that declared policy, this Couft has consistently refused a declaratory judgment where the question presented is abstract, theoretical or based upon a contingency which may or may not arise."

The Court holds that these issues raised by McDaniel are not justiciable controversies under the declaratory

judgment statute. The Court will enter a Decree, declaring the following part of Section 4 of Chapter 848 of the Public Acts of 1976 in violation of the requirements of the First Amendment of the federal Constitution:

> ". . . who can qualify for membership in the House of Representatives of the General Assembly . . ."

and declaring the requirements for the office of delegate to be determined by the general statutes on qualifications for office-holders, as set forth in the Code of Tennessee. The candidate, Paul A. McDaniel, is declared eligible to be a candidate and to serve as a delegate, if elected by the voters, and all other persons similarly situated composing this class. The remaining issues raised in the pleadings, including the prayer for injunctive relief, will in all things be dismissed. An immediate appeal will be granted to the Supreme Court of the State of Tennessee to any aggrieved party. Solicitors for McDaniel shall present a Decree consistent with this Memorandum, with costs equally adjudged against Paty and McDaniel.

/s/ HERSCHEL P. FRANKS
Chancellor - Part 2

APPENDIX E

TO THE HONORABLE CHANCELLORS
OF THE CHANCERY COURT
OF HAMILTON COUNTY, TENNESSEE

SELMA CASH PATY, A resident of Hamilton County, Tennessee
PLAINTIFF

versus

REV. PAUL A. McDANIEL, TOM MOORE, JR., Registrar at Large, CHARLES W. HINSON, JAMES W. PENLEY, ALBERT W. SECOR, MRS. TOMMIE CARTER, and CLAUDED CLARK, JR., all members of the Hamilton County Election Commission, and all residents of Hamilton County, Tennessee
DEFENDANTS

DOCKET NO: 51094

PART _____

COMPLAINT FOR DECLARATORY JUDGMENT

(Filed September 26, 1976)

Comes Selma Cash Paty and for her cause of action says:

I.

The allegations of residence in the caption are true.

II.

Tom Moore, Jr. is Registrar at Large of Hamilton County Election Commission.

III.

Charles W. Hinson, James W. Penley, Albert W. Secor, Mrs. Tommie Carter, and Claude Clark, Jr. are all the members of the Hamilton County Election Commission, of which Charles W. Hinson, is Chairman.

IV.

Plaintiff is a duly qualified candidate for a delegate for the Constitutional Convention.

V.

Rev. Paul A. McDaniel is not qualified to serve in the Constitutional Convention by the Constitution Disqualification contained in Article IX of the Tennessee Constitution which

[2]

states:

> "Section 1. Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

The call for the Convention Public Act 848, Section 4, sets the qualifications for delegates to the convention, as follows:

> "Section 4. *Any citizen of the State who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention* upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

VI.

The Rev. Paul A. McDaniel is a Minister of God, serving as pastor of a Baptist Church at this time.

VII.

In the event Rev. Paul A. McDaniel is elected to serve, he could not constitutionally be seated, and the 29th District would be without an elected delegate.

VIII.

It would be unjust to the people of the 29th District to allow the Rev. Paul A. McDaniel's name to remain on the ballot and to lead the people of that district to

believe he could serve if elected. The matter should be decided by the Court prior to the election.

IX.

The Election Commission has certified his petition and will not remove his name from the ballot unless ordered to do so by this Court. The ballots will be ordered printed on or about October 4, 1976.

[3]

PREMISES CONSIDERED: PLAINTIFF PRAYS THAT:

1. This complaint be filed and process issue and be served on all defendants.

2. A temporary restraining order issue restraining the Election Commission from printing the ballots until the issue of Rev. Paul A. McDaniel's eligibility is determined by this Court.

3. A show cause issue requiring the defendants to appear and show cause why the Rev. Paul A. McDaniel's name should not be ruled ineligible to serve as a delegate to the Constitutional Convention and why his name should not be stricken from the ballot.

4. At the hearing, the Court decide whether or not Rev. Paul A. McDaniel is disqualified from serving as a delegate to the Constitutional Convention.

5. In the event the Court rules that he is disqualified from serving as a delegate that an injunction issue restraining the Election Commission from placing his name on the ballot.

6. General relief.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY PROCESS IN THIS CAUSE.

/s/ Selma C. Paty
SELMA C. Paty

STATE OF TENNESSEE:

COUNTY OF HAMILTON:

Personally appeared before me Selma C. Paty, who after first being duly sworn, makes oath that she has read the foregoing complaint, knows the contents thereof, and that the same is true and correct to the best of knowledge, information and belief.

This 28 day of September, 1976.

/s/ BARBARA LAWSON
NOTARY PUBLIC

MY COMMISSION EXPIRES: 1-7-80

APPENDIX F

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
PART II

SELMA CASH PATY	*	
	*	
V.	*	NO. 51094
	*	
REV. PAUL A. McDANIEL	*	
Et Al.	*	

ANSWER OF DEFENDANT, REV. PAUL A. McDANIEL

(Filed October 4, 1976)

Comes defendant, Reverend Paul A. McDaniel, and for answer to the Complaint filed in this cause says:

I

Defendant admits the allegations contained in Paragraphs I, II, and III of the Complaint.

II

This defendant is uninformed as to whether plaintiff is a duly qualified candidate for a delegate to the Constitutional Convention, as alleged in Paragraph IV of the Complaint, but admits that she has been certified by the Hamilton County Election Commission as a qualified candidate for election as a delegate to the Constitutional Convention.

III

Defendant denies that he is not qualified to serve as a delegate to the Constitutional Convention, but admits the other allegations contained in Paragraph V of the Complaint.

IV

The allegations contained in Paragraph VI of the Complaint are admitted.

V

The allegations contained in Paragraphs VII and VIII of the Complaint are denied.

VI

The allegations contained in Paragraph IX of the Complaint are admitted.

[2]

VII

This defendant alleges that he is a duly qualified candidate for election to the Constitutional Convention, referred to in the Complaint, and that he is not disqualified as alleged in the Complaint. This defendant alleges that the constitutional and legislative provisions relied upon by the plaintiff in her Complaint violate the Constitution of the United States, Amendment 1 and Amendment 14, Section 1, and are repugnant and contradictory to the provisions of Article 1, Section 4, and Article 9, Section 2, of the Constitution of the State of Tennessee (and hence violate the provisions of the aforementioned Amendments 1 and 14 of the Constitution of the United States).

Appendix F

VIII

This defendant alleges that the Court is without jurisdiction to hear and determine the questions involved in this cause.

Having answered the Complaint, the defendant prays that he be dismissed with his costs.

/s/ J. THOMAS MANN
J. Thomas Mann, Attorney for
Defendant, Rev. Paul A.
McDaniel
330 Pioneer Building
Chattanooga, Tennessee 37402
Telephone: 265-0214

[Certificate of Service Omitted]

APPENDIX G

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
PART 2

SELMA CASH PATY	•	
	•	
vs.	•	NO 51094
	•	
REV. PAUL A. McDANIEL, ET AL.	•	

COUNTER-COMPLAINT, CROSS-COMPLAINT AND THIRD-PARTY COMPLAINT OF DEFENDANT REV. PAUL A. McDANIEL FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed October 21, 1976)

Defendant, Rev. Paul A. McDaniel, previously having filed his Answer in this cause, now, with leave of Court pursuant to Rules 13 and 14 of the Tennessee Rules of Civil Procedure, assumes the role of Counter-Plaintiff, Cross-Plaintiff and Third-Party Plaintiff (hereinafter referred to as "Counter-Plaintiff"), and filed this his Counter-Complaint, Cross-Complaint and Third-Party Complaint (hereinafter referred to as "Counter-Complaint"), against the following persons: RAY BLANTON, Governor of the State of Tennessee; BROOKS MCLEMORE, Attorney General of the State of Tennessee; JOE C. CARR, Secretary of the State of Tennessee; SHIRLEY HASSLER, Coordinator of Elections for the State of Tennessee;

LYTEL LANDERS, Chairman of the State Election Commission of Tennessee; JAMES E. HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, and JACK C. SEATON, members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission, Hamilton County, Tennessee; CLAUDE CLARK, MRS. TOMMIE CARTER, JAMES W. PENLEY AND ALBERT W. SECOR, members of the Hamilton County Election Commission, Hamilton County, Tennessee; TOM MOORE, JR., Registrar-at-Large for the Hamilton County Election Commission, Hamilton County, Tennessee; and SELMA CASH PATY, original plaintiff in the above-styled cause.

For cause of action, counter-plaintiff, Rev. Paul A. McDaniel, says:

I

Counter-defendant, Ray Blanton, is Governor of the

[2]

State of Tennessee. As such, under the provisions of Article 3, Section 10, of the Constitution of the State of Tennessee, he is charged with the responsibility of faithfully carrying out and executing the laws of the State of Tennessee and of the United States. He resides in Davidson County, Tennessee.

Counter-defendant, Brooks McLemore, is Attorney General of the State of Tennessee. As such he is its executive head of the legal department of the state, and, pursuant to the provisions of *Tennessee Code Annotated*, Sections 8-603 and 8-609, is charged with the responsibility of furnishing legal advice to the departments of the state and of defending litigated matters in which the state or

any of its officers or departments is interested. Under *Tennessee Code Annotated*, Section 23-1107, the Attorney General is a necessary party in any declaratory judgment proceeding challenging the constitutionality of any state statute. He resides in Davidson County, Tennessee.

Counter-defendant, Joe C. Carr, is Secretary of the State of Tennessee. Under the provisions of *Tennessee Code Annotated*, Section 2-111, it is his duty to appoint a Coordinator of Elections of the State of Tennessee to serve at the pleasure of the Secretary of State. He resides in Davidson County, Tennessee.

Counter-defendant, Shirley Hassler, is Coordinator of Elections of the State of Tennessee. Under *Tennessee Code Annotated*, Sections 2-1111 and 2-1112, it is his duty to obtain and maintain uniformity in the operation and interpretation of election laws of the state, to supervise all elections in the state, to advise election commissions and registrars-at-large, and to interpret the election laws for all persons administering them. He resides in Davidson County, Tennessee.

Counter-defendant, Lytel Landers, is chairman, and counter-defendants, James E. Harpster, Tommy Powell, Richard Holcomb and Jack C. Seaton, are members of the State Election Commission of Tennessee. Under the provisions of *Tennessee*

[3]

Code Annotated, Section 2-1201, it is the duty of the election commission to appoint election commissioners for each county in the state. The principal office of the State Election Commission is in Davidson County, Tennessee.

Counter-defendant, Charles Hinson, is chairman, and counter-defendants, Claude Clark, Mrs. Tommie Carter, James W. Penley, and Albert W. Secor, are members of the Hamilton County Election Commission. Under the provisions of *Tennessee Code Annotated*, Section 2-1209, it is their duty to employ a Registrar-at-Large for Hamilton County to assist them in performing their duties under the election laws of the state. They reside in Hamilton County, Tennessee, and are original defendants in the above-styled cause.

Counter-defendant, Tom Moore, Jr., is Registrar-at-Large for the Hamilton County Election Commission. He resides in Hamilton County, Tennessee, and is an original defendant in the above-styled cause.

Counter-defendant, Selma Cash Paty, is a candidate opposing counter-plaintiff for election as a delegate from the 29th legislative district in Hamilton County to the Tennessee Constitutional Convention referred to in the original complaint and answer filed in the above-styled cause. She is a resident of Hamilton County, Tennessee, and is the original plaintiff in the above-styled cause.

II

This cause arises under *Tennessee Code Annotated*, Title 23, Chapter 11, and 42 U.S.C. §1983.

III

Counter-plaintiff, Rev. Paul A. McDaniel, brings this action individually and as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who wish to vote for candidates for election as delegates to the 1977 Constitutional Convention in the State of Tennessee,

in the

[4]

General Election to be held in the state on November 2, 1976, or subsequent elections for delegates to subsequent Constitutional Conventions to be convened in the State of Tennessee; as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who wish to vote for candidates for election as members of the House of Representatives and Senate in the State of Tennessee, in the General Election to be held on November 2, 1976, and subsequent elections in the State of Tennessee for such offices; as a class action on behalf of himself and other putative candidates who are or may be a "Minister of the Gospel" or "priest of any denomination whatever", present and future, and who wish to seek election as a delegate to the 1977 Constitutional Convention in the State of Tennessee, in the General Election to be held in the state on November 2, 1976, or subsequent constitutional conventions to be convened in the State of Tennessee; as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who wish to vote for a candidate (who is a "Minister of the Gospel" or "priest of any denomination whatever") for election as a delegate to the 1977 Constitutional Convention in the State of Tennessee, in the General Election to be held in the state on November 2, 1976, or subsequent elections for delegates to subsequent constitutional conventions to be convened in the State of Tennessee; and as a class action on behalf of himself and others similarly situated as independent voters in the State of Tennessee, present and future, who

wish to vote for a candidate (who is a "Minister of the Gospel" or "priest of any denomination whatever") for election as a member of the House of Representatives or Senate in the State of Tennessee, in the General Election to be held on November 2, 1976, and subsequent elections in the State of Tennessee for such offices.

[5]

This class action is brought pursuant to Rule 23, Tennessee Rules of Civil Procedure, generally, and specifically pursuant to Rule 23.01 and Rule 23.02(2), Tennessee Rules of Civil Procedure.

IV

Counter-plaintiff repeats the admissions and averments contained in his Answer to the original Complaint filed in this cause, as if fully set forth herein.

V

Counter-plaintiff avers that he and counter-defendant, Selma Cash Paty, are opposing candidates in the 29th legislative district of Hamilton County for election as a delegate to the Tennessee Constitutional Convention called pursuant to the provisions of Tennessee Public Acts, 1976, Chapter 848. Under Section 3 of said Act, delegates shall be elected at the General Election to be held in the state on November 2, 1976.

VI

Under Section 4 of said Public Act, "[a]ny citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention. . . ." The Hamilton County Election Commission has certified both

counter-plaintiff and counter-defendant, Selma Cash Paty, as qualified candidates for election as a delegate to the convention from the 29th legislative district in Hamilton County.

VII

By the filing of the original Complaint in this cause, by counter-defendant, Selma Cash Paty, claiming that counter-plaintiff is ineligible to be a candidate for election as a delegate to the convention, because of the provisions of Article 9, Section 1, of the Constitution of the State of Tennessee, a substantial cloud has been placed upon counter-plaintiff's candidacy. The inevitable resulting confusion in the minds of voters in the 29th district constitutes a threat of injury

[6]

to counter-plaintiff's candidacy that is real and immediate.

VIII

Counter-defendant avers that he is a citizen of the United States and of the State of Tennessee and that he is a qualified voter registered in Hamilton County, Tennessee. He intends to vote in the coming election and in future elections held in the State of Tennessee. He would like to vote for a "Minister of the Gospel" or "priest of any denomination whatever" in the coming election for delegates to the Constitutional Convention and in future elections for delegates to constitutional conventions. He would like to vote for a "Minister of the Gospel" or "priest of any denomination whatever" in the coming election and in future elections for membership in the Tennessee House of Representatives and Senate. More-

over, he may be a candidate for election as a delegate in future elections for delegates to a subsequent constitutional convention as well as a candidate for election as a member of the Tennessee House of Representatives or Senate in future elections.

IX

Counter-plaintiff avers that he is a Black "minister of the Gospel". The political leadership among Black people in his community and other communities in Tennessee disproportionately consists of persons who are "ministers of the Gospel" as compared to the political leadership in white communities in Tennessee. As a result, exclusion of ministers by effect, albeit not by original intent, dilutes on racial grounds the right of counter-plaintiff and other voters and putative candidates, similarly situated, to vote and to be candidates, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

X

Counter-plaintiff alleges that the qualification

[7]

provisions of Section 4, Chapter 848, Tennessee Public Acts, 1976, and Article 9, Section 1, of the Tennessee Constitution are unconstitutional under the First and Fourteenth Amendments of the United States Constitution, in that they purport to deprive him of his right to candidacy and of his free exercise of voting and political association privileges guaranteed to him as a citizen of the United States and of the State of Tennessee. In addition, said statutory and constitutional provisions deprive counter-

plaintiff of the free exercise of religion and amount to an establishment of religion, both in violation of the First Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution.

XI

Because of the immediate threat of injury to counter-plaintiff and the irreparable damage that may be suffered by him in the forthcoming election, counter-plaintiff requests that forthwith, in the exercise of inherent equity powers and powers conferred under *Tennessee Code Annotated*, Title 23, Chapter 11, the Court declare that the candidate qualification provisions of Section 4, Chapter 848, Tennessee Public Acts, 1976, and Article 9, Section 1, of the Constitution of the State of Tennessee, are unconstitutional under the First and Fourteenth Amendments of the United States Constitution; the Court declare counter-plaintiff eligible as a candidate for election as a delegate to the 1977 Tennessee Constitutional Convention; and the Court issue an injunction restraining each of the defendants from excluding counter-plaintiff as a candidate in said election and from interfering in any manner with his candidacy in said election. Counter-plaintiff further requests the Court to issue an injunction restraining each of the defendants, as may be applicable, from excluding or disqualifying "Ministers of the Gospel" or "priests of any denomination whatever" as candidates for election as delegates to the 1977 Tennessee Constitutional Convention or any subsequent state constitutional convention

[8]

or as candidates for membership in the Tennessee House of Representatives and Senate in the coming election and in subsequent elections for such offices.

PREMISES CONSIDERED, COUNTER-PLAINTIFF PRAYS:

1. That a summons be issued and, together with a copy of this counter-complaint, be served upon all counter-defendants who are not now before the court as parties, and that all defendants be required to answer this counter-complaint but not under oath.

2. That, after a hearing, the Court enter a judgment declaring:

a. That counter-plaintiff is an eligible candidate for election as a delegate from the 29th legislative district to the 1977 Tennessee Constitutional Convention.

. b. That the delegate qualification provisions of Section 4, Chapter 848, Tennessee Public Acts, 1976, and Article 9, Section 1, of the Tennessee Constitution are unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

3. That, after a hearing, the Court issue an injunction:

a. Restraining each of the defendants from excluding counter-plaintiff as a candidate for election as a delegate to the 1977 Tennessee Constitutional Convention and from interfering in any manner with his candidacy in said election.

b. Restraining each of the defendants, as may be applicable, from excluding or disqualifying "Ministers of the Gospel" or "priest of any denomination whatever" as candidates for election as delegates to the 1977 Tennessee Constitutional Convention or any subsequent state constitutional conventions, or as candidates for election

as members of the Tennessee House of Representatives and Senate in the General

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Election to be held on November 2, 1976, and in subsequent elections for such offices.

4. That because of the limitations of time this matter be expedited for hearing and decision by the Court.

5. That counter-plaintiff have such further relief to which he may be entitled.

This is the second application for extraordinary relief in this cause.

FREDERIC S. LECLERCQ, and
THOMAS, LEITNER, MANN,
WARNER & OWENS

By: /s/ J. THOMAS MANN
Attorneys for Counter-Plaintiff, Rev. Paul A. McDaniel
330 Pioneer Building
Chattanooga, Tennessee 37402
Telephone: 265-0214

[Certificate of Service Omitted]

APPENDIX H

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE
PART 2

SELMA CASH PATY	•	
	•	
vs.	•	NO. 51094
REV. PAUL A. McDANIEL, ET AL.	•	

ORDER

In this cause, the "Counter-Complaint, Cross-Complaint and Third Party Complaint of Defendant, Rev. Paul A. McDaniel, for Declaratory Judgment and Injunctive Relief" having been filed as a class action pursuant to Rule 23 of the Tennessee Rules of Civil Procedure, and the Court having considered said pleading together with the entire record in this cause, the Court is of the opinion and determines and finds that, as required by Rule 23.01, (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class; and further, as required by Rule 23.02(2), the Court is of the opinion and determines and finds that the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

Accordingly, it is ORDERED AND ADJUDGED that the "Counter-Complaint, Cross-Complaint and Third-Party Complaint of defendant, Rev. Paul A. McDaniel, for Declaratory Judgment and Injunctive Relief" shall be maintained as a class action pursuant to Rule 23.01 and Rule 23.02(2), Tennessee Rules of Civil Procedure.

Enter this 22nd day of October, 1976.

/s/ HERSCHEL P. FRANKS
CHANCELLOR, PART 2

ENROLLED October 22, 1976,
BOOK U-2 PAGE 277

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APPROVED FOR ENTRY:

/s/SELMA CASH PATY
Selma Cash Paty, Pro Se
Plaintiff
17-19 Patten Parkway
Chattanooga, Tennessee 37402

FREDERIC S. LECLERCQ and
THOMAS, LEITNER, MANN, WARNER & OWENS

By: /s/ J. THOMAS MANN
Attorneys for Defendant,
Rev. Paul A. McDaniel
330 Pioneer Building

THEREUPON, COURT ADJOURNED UNTIL MONDAY

MORNING, OCTOBER 25, 1976, AT 9:00 O'CLOCK, A.M.

/s/ HERSCHEL P. FRANKS,
CHANCELLOR - PART II

APPENDIX I

CHANCERY COURT,
HAMILTON COUNTY, TENNESSEE, PART II

SELMA CASH PATY	•	
	•	
versus	•	Docket No. 51094
	•	
REV. PAUL A. McDANIEL, et al	•	

ANSWER OF SELMA CASH PATY

(Filed October 22, 1976)

Comes Selma Cash Paty for answer to that part of the counter-complaint that is material to the cause of action and says:

This defendant admits there is a cloud on counter-plaintiff's candidacy but denies that the filing of her complaint placed the cloud on his candidacy.

The Constitution of the State of Tennessee, Article 9 Section 1, clearly states ministers are not qualified to serve in the House of Representatives. Chapter 848 Section 4 by reference disqualifies ministers from serving as delegates to the Constitutional Convention.

Rev. Paul A. McDaniel knew the above statute and section of the Constitution diqualified him. When he chose to run without first judicially having determined the constitutionality of said law, he elected to run with a cloud on his candidacy. That cloud was placed there by the Constitution of the State of Tennessee in 1796.

The Court must presume the Constitutional Convention would follow the law as it exists when it convenes. Relying on the law in the State of Tennessee as it was when her action was filed, the convention could not seat a minister.

She filed the original declaratory action, because she felt the voters did have the right to know counter-defendant could not be seated, if elected, unless the Court declared the statute and Constitution provision setting the qualifications

for delegates unconstitutional.

This counter-defendant has always maintained that this issue should be judicially decided before the election so the cloud would be lifted and the voters could cast their ballot in the sunshine.

Counter-plaintiff's allegation that he is a "Black" minister is totally immaterial to this issue and is an unwarranted attempt to inject racism into the issue. The questioned statute and Constitution provisions applies to all ministers, of every race, color or creed.

There is no proof in the record or in fact that "Black" ministers are any more or less politically active then "White" ministers.

Counter-defendant denies the prohibition denies counter-plaintiff of his free exercise of voting and political association privileges. She denies he has an absolute right to be a candidate for the House of Representatives or the Contitutional Convention. The state has an overriding interest in separating church and state which it has elected to exercise by restricting the service of ministers in the lawmaking processes of its government.

Said provisions do not deprive counter-plaintiff of his right of free exercise of religion. There is no restrictions on his religion, only on his profession.

Ministers, classified as an occupation, were granted exemption from the draft.

Ministers, classified as an occupation, are granted exemption from jury duty.

Ministers, classified as an occupation, do not pay taxes on the value of the use of a parsonage or manse, although all other employed persons must pay such taxes.

Constitutionally it is not permissible to favor one religion over another, or religion to non-religion. Therefore,

if counter-plaintiff's contentions were correct those laws which grant special privileges to ministers would be unconstitutional.

All other allegations not expressly admitted or denied are denied.

S. C. PATY
(MRS.) SELMA C. PATY
APPELLANT
AND
COUNTER-DEFENDANT

[Certificate of Service Omitted]

APPENDIX J

IN THE
CHANCERY COURT,
HAMILTON COUNTY, TENNESSEE, PART 2

SELMA CASH PATY	•	
	•	
versus	•	NO. 51094
	•	
REV. PAUL A. MCDANIEL, ET AL.	•	

FINAL JUDGMENT

(Filed October 25, 1976)

This cause came on to be further heard on the 22nd day of October, 1976, before the Honorable Hershcel P. Franks, Chancellor of the Chancery Court for Hamilton County, Tennessee, Part 2, upon the Order of Remand and Procedendo issued by the Supreme Court of Tennessee; the original Complaint filed by plaintiff, Selma Cash

Paty; the Motion to Dismiss and Answer filed by defendant, Rev. Paul A. McDaniel; oral testimony previously heard in open court; the Waiver and Acknowledgment of E. Brooks McLemore, Attorney General of the State of Tennessee; dated October 18, 1976; the Counter-Complaint, Cross-Complaint, and Third-Party Complaint of Defendant, Rev. Paul A. McDaniel, for Declaratory Judgment and Injunctive Relief; the Order of the Court allowing the said Counter-Complaint, Cross-Complaint and Third-Party Complaint to be maintained as a Class Action pursuant to Rule 23.01 and Rule 23.02(2), Tennessee Rules of Procedure; the Acknowledgment of Service and Waiver of counter-defendant, Tom Moore, Jr., Registrar-at-Large, dated October 21, 1976, on behalf of himself and the counter-defendants who are members of the Hamilton County Election Commission; the Acknowledgment and Waiver of counter-defendant, E. Brooks McLemore, Attorney General of the State of Tennessee, dated October 21, 1976, on behalf of himself and counter-defendants Ray Blanton, Governor of the State of Tennessee, Joe C. Carr, Secretary of the State of Tennessee, Shirley Hassler, Coordinator of Elections of the State of Tennessee, Lytel Landers, Chairman of the State Election Commission, and James E. Harpster, Tommy Powell, Richard Holcomb and Jack C. Seaton, members of the State Election Commission; the Answer of counter-defendant,

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Selma Cash Paty; the Stipulation filed on behalf of counter-plaintiff, Rev. Paul A. McDaniel, and counter-defendant, Selma Cash Paty; and upon the entire record in this cause.

Upon consideration of all of the foregoing, the Court rendered a Memorandum Opinion which is incorporated herein and made a part hereof as follows:

(Clerk here copy Memorandum Opinion in full)

It is, therefore, ORDERED and ADJUDGED as follows:

1. That the Motion to Dismiss filed by defendant, Rev. Paul A. McDaniel, be and it hereby is overruled.

2. That the portion of Section 4 of Chapter 848 of the Public Acts of Tennessee, 1976, which reads, ". . . who can qualify for membership in the House of Representatives of the General Assembly . . .", be and it hereby is declared to be in violation of the requirements of the First Amendment of the federal Constitution.

3. That the requirements for the office of delegate to the 1977 Tennessee Constitutional Convention be and they hereby are declared to be determined by the general statutes on qualifications for office-holders, as set forth in the Code of Tennessee.

4. That defendant and counter-plaintiff, Rev. Paul A. McDaniel, and all other persons, similarly situated, composing the class of "ministers of the Gospel" and "priests of any denomination whatever", be and hereby are declared to be eligible to be a candidate and to serve as a delegate to the 1977 Tennessee Constitutional Convention called for by Chapter 848 of the Public Acts of Tennessee, 1976.

5. That the Restraining Order in this cause, enrolled in the minutes of the Court on September 28, 1976, be and it hereby is dissolved.

6. That all other relief sought by the parties and raised in the pleadings, including the prayer of counter-plaintiff, Rev. Paul A. McDaniel, for injunctive relief, be and hereby is denied.

7. That the costs of this cause be adjudged equally against the parties, Selma Cash Paty and Rev. Paul A. McDaniel.

To all of the foregoing action of the Court, plaintiff and counter-defendant, Selma Cash Paty, excepts and prays an immediate appeal to the Supreme Court of Tennessee at Knoxville, which is hereby granted, and to which defendant, Rev. Paul A. McDaniel, does not object.

Enter this 25th day of October, 1976.

/s/ HERSCHEL P. FRANKS
CHANCELLOR, PART 2

APPROVED FOR ENTRY:

/s/ SELMA CASH PATY
Selma Cash Paty, Pro Se
Plaintiff and Counter-Defendant
17-19 Patten Parkway
Chattanooga, Tennessee 37402

FREDERIC S. LECLERCQ and
THOMAS, LEITNER, MANN, WARNER & OWENS

By: /s/ J. THOMAS MANN
Attorneys for Defendant
and Counter-Plaintiff
Rev. Paul A. McDaniel
330 Pioneer Building
Chattanooga, Tennessee 37402